NO. 21643✓

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON McGUIRE,

Appellant,

vs.

GENERAL FOODS,

Appellee.

APPELLANT'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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THORNTON & MEDVENE

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Los Angeles, California

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TOPICAL INDEX

APPENDIX I

TABLE OF AUTHORITIES

Statutes	Page
Clayton Act, §3 (15 U.S.C.A. §14)	2, 8, 14
Sherman Act:	
§1 (15 U.S.C.A. §1)	2, 8, 14
§2 (15 U.S.C.A. §2)	2, 8, 14
15 U.S.C.A. §4	2
15 U.S.C.A. §15	2
15 U.S.C.A. §25	2
28 U.S.C.A. §1291	3
28 U.S.C.A. §1292	3
28 U.S.C.A. §1294(1)	3
28 U.S.C.A. §1337	2

Rules

Federal Rules of Civil Procedure:	
Rule 43(e)	70
Rule 56	25
Rule 56(c)	25
United States Court of Appeals for the Ninth Circuit:	
Rule 17(6)	22

Miscellaneous

Activities of Regulatory and Enforcement Agencies Relating to Small Business (Federal Communications Commission) House Report No. 2344, December 1966	59-63
Barrow Report, January 27, 1958, House Committee on Interstate and Foreign Commerce	50
Federal Communications Commission's Office of Network Study Report "Television Network Program Procurement", May 8, 1963	50

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I

STATEMENT OF PLEADINGS DISCLOSING THE BASIS OF JURISDICTION

Appellant, on September 14, 1965, filed a complaint in the then United States District Court for the Southern District of California, Central Division (hereinafter the United States District Court, Central District of California), against Columbia Broadcasting System, Inc., Columbia Broadcasting System Films, Inc., and appellee, General Foods, alleging violations of the federal anti-trust laws [CT 2]. [1] The complaint alleges the defendants

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[1] CT refers to Clerk's Transcript.

violated the anti-trust laws of the United States and specifically Section 1 of the Sherman Act (15 U.S.C.A. §1); Section 2 of the Sherman Act (15 U.S.C.A. §2); and Section 3 of the Clayton Act (15 U.S.C.A. §14) [CT 2-19].

Jurisdiction of the United States District Court for the Central District of California is based upon 15 U.S.C.A. §§ 4, 15 and 25, and 28 U.S.C.A. §1337.

On November 29, 1965, appellee General Foods filed its answer to the complaint [CT 20].

On December 30, 1965, defendants Columbia Broadcasting System, Inc. and Columbia Broadcasting System Films, Inc. filed a joint answer to the complaint [CT 32].

On March 8, 1966, appellee General Goods moved for summary judgment [CT 74].

On May 27, 1966, appellant Don McGuire filed his opposition to appellee's motion for summary judgment [CT 187].

On May 31, 1966, United States District Judge Jesse W. Curtis conducted a hearing on appellee's motion for summary judgment; and on June 9, 1966, Judge Curtis granted appellee's motion [CT 241].

On July 6, 1966, appellant noticed his appeal to this Court from the order granting summary judgment; appellee moved to dismiss this appeal as not being final and lacking the District Court's certification of finality, and this Court dismissed the appeal on November 2, 1966 [CT 243].

On November 9, 1966, appellant moved in the District Court

to amend the order granting appellee summary judgment by finding and concluding that there was no just reason for delaying this appeal [CT 272]; appellee opposed said motion [CT 279]; and the District Court Judge Jessee W. Curtis on December 20, 1966, amended the order granting appellee summary judgment in which the court specifically found and concluded that there was no just reason to delay this appeal [CT 313]. The amended order granting such judgment was entered and filed on December 20, 1966 [CT 313]. Appellant filed his notice of appeal on December 22, 1966 [CT 319].

This Court has jurisdiction over this appeal under 28 U.S.C.A. §§ 1291, 1292 and 1294(1).

II

STATEMENT OF THE CASE

This is an appeal from a District Court order granting one of three defendants summary judgment prior to the commencement of any discovery proceedings relative to the successful defendant; therefore, appellant sets forth below a brief review of the pleadings.

A. The Verified Complaint [2]

1. Jurisdiction and Venue

Jurisdiction and venue of this case is in the United States District Court, Central District of California.

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[2] Appendix I to this brief diagrams the complaint and the answers.

2. Description of the Parties

Appellant, Don McGuire, an independent writer, director and producer of television shows and television series, wrote, directed and produced three television pilots for television series for the 1965-1966 prime time television season entitled A MAN NAMED McGHEE (hereinafter called McGHEE); MEET MAGGIE MULLIGAN (hereinafter called MULLIGAN); and PRESENTING MONA McCLUSKEY (hereinafter called McCLUSKEY).

Defendant Columbia Broadcasting System, Inc. (hereinafter called CBS) operated the nationwide CBS television network, consisting of five wholly owned television stations and some 200 affiliated television stations located throughout the United States. CBS syndicates films to television stations and maintains and operates foreign merchandising and distribution organizations. CBS owns as a wholly owned subsidiary the defendant Columbia Broadcasting System Films, Inc. (hereinafter called CBS Films) and, through this subsidiary, produces television shows and series for network television exhibition during prime time and as such is a competitor of appellant. CBS enters into contracts, arrangements, agreements and understandings whereby television shows and series are produced for exhibition on network television during prime time in which CBS has an ownership, profit participation, or financial investment, and as such is a competitor of appellant.

Defendant CBS Films, a California corporation, is engaged in the business of producing television shows and television series for exhibition on network television during prime time, and as

such is a competitor of plaintiff.

Appellee General Foods (hereinafter called GF), a Delaware corporation, markets throughout the United States and many foreign countries a diversified line of packaged foods and grocery products, such as Jello, Postum, Post Cereals, Maxwell House Coffee, Walter Baker's Chocolate, Calumet Baking Powder, Minute Rice, Swan's Down Flour, Bird's Eye Frozen Foods, Kool-Aid, and Gaines Dog Food. GF is a national television advertiser who spends many millions of dollars a year advertising its products on network television during prime time. GF sponsors television series exhibited on CBS' television network during prime time for which GF agrees to pay and pays CBS for "talent" and "time", that is, for the production of the show and for the air time during which the show is exhibited.

3. Description of Co-Conspirators

The 200 non-owned television stations throughout the United States that are affiliated with CBS and its five wholly owned television stations, making up the CBS television network, are named as co-conspirators but not as defendants.

The national television advertisers who have a contractual relationship with CBS, whereby they advertise their products on the CBS television network during prime time are named as co-conspirators but not named as defendants.

4. Nature of Trade and Commerce

Television shows exhibited on CBS television network during prime time, the three and one-half hours between 7:30 and 11:00

P. M. each evening, seven days a week, are in interstate and foreign commerce. These shows are almost exclusively filmed shows produced in the Southern District of California and thereafter sent in interstate and foreign commerce to 200 cities in the United States and many cities outside of the United States. Network television is by definition the distribution in interstate and foreign commerce of television signals and communications. Once a television series has been exhibited on CBS' television network during prime time, it is frequently syndicated to television stations throughout the world, and CBS is in the business of syndicating and distributing throughout the world television shows that had once been exhibited on network during prime time. GF advertises its products on CBS' television network during prime time; its commercials are almost exclusively films produced in either New York or California and thereafter sent in interstate and foreign commerce to some 200 cities in the United States and many cities outside of the United States.

5. Offenses Charged

Beginning on or about 1960, CBS adopted and started the policy whereby CBS would not exhibit television shows or series over its network during prime time unless it had a financial interest and control of the show or series; each year for the past five years CBS increased its financial interest in and control of the percentage of shows and series so exhibited so that for the 1965-1966 television broadcast year CBS had a financial interest in and control of virtually every television show and series exhibited on CBS'

television network during prime time; and in so doing the defendants and co-conspirators violated the anti-trust laws.

The defendant and co-conspirators have been and are now engaged in an unlawful combination and conspiracy and have been and are now parties to unlawful contracts, agreements and understandings among themselves in unreasonable restraint of interstate and foreign trade and commerce of television shows and series for exhibition over CBS' television network during prime time.

The objective of the unlawful combination and conspiracy was and is that no television show or series will be exhibited on the CBS television network during prime time unless CBS has a financial interest in and control over the television show or series. It was part of the same unlawful combination and conspiracy that any television show or series that was or would be independently produced would be boycotted and not exhibited or sponsored on CBS' television network; and appellee GF, as part of the unlawful combination and conspiracy to boycott any television series to be independently produced, and thus independently owned and controlled.

It was part of said unlawful combination and conspiracy that CBS would and would attempt to obtain exclusive contracts from national television advertisers which would provide that the advertiser would not sponsor television shows or series during prime time on any other nationwide television network.

In 1964, CBS and GF agreed that GF would sponsor television shows and series during prime time exclusively on CBS' television network; that is, appellee GF agreed with CBS that GF

would not buy talent and time for prime time on any other television network; the effect of such dealings was to substantially lessen competition and tend to create a monopoly.

Beginning on or about 1960, CBS has monopolized and has attempted to monopolize and has combined and conspired with CBS Films and appellee GF and with the other co-conspirators to monopolize the interstate and foreign commerce of television shows and series to be exhibited during prime time on the CBS television network.

The unlawful monopoly and attempt to monopolize and the conspiracy to monopolize consists of the continuing efforts, insistence and demand of CBS that it have a financial interest in and control of every television show and series exhibited on its network during prime time or else the show or series will not be exhibited on CBS' television network. CBS affiliates have no control over what will or will not become a television series and they are obligated to accept their prime time television shows from CBS even though CBS has a financial interest in and control over the show.

The above said activity is in violation of the anti-trust laws of the United States and more specifically of Sections 1 and 2 of the Sherman Act as amended (15 U.S.C.A. §§ 1 and 2) and Section 3 of the Clayton Act as amended (15 U.S.C.A. §14).

6. Details of the Offenses Charged

(a) Regarding McGHEE and MULLIGAN

In the summer of 1964, GF committed itself to finance eight television pilots for the 1965-1966 season at a cost of $816,000.

Benton and Bowles Advertising Agency, on behalf of GF, requested that appellant write, direct and produce two of the eight television pilots, namely: McGHEE and MULLIGAN.

Appellant wrote, directed and produced the television pilots McGHEE and MULLIGAN.

Defendants CBS and CBS Films had no financial interest in or control over eight McGHEE or MULLIGAN.

Appellant delivered the finished pilots of both McGHEE and MULLIGAN television pilots to GF in January of 1965.

GF viewed the eight television pilots it had financed, including McGHEE and MULLIGAN and then notified appellant that McGHEE was the best of the eight and that GF intended to sponsor McGHEE as a television series on prime time on the CBS television network.

GF requested appellant to exhibit the McGHEE and MULLIGAN pilots for CBS, which the appellant did. Appellant advised CBS that GF had already selected McGHEE as the show that it would sponsor on the CBS television network during prime time in the 1965-1966 television season.

CBS notified GF that CBS would not exhibit McGHEE on its television network and that GF should sponsor two other television shows called COUNTRY COUSINS and HOGAN'S HEROES.

The television show COUNTRY COUSINS (since renamed GREEN ACRES) was only a title and an idea and was not a filmed television pilot; the television show HOGAN'S HEROES at this same time was a finished television pilot.

CBS had and has a financial interest in and control over both COUNTRY COUSINS and HOGAN'S HEROES.

GF, along with Benton and Bowles, met with CBS and again advised CBS that GF wished to sponsor McGHEE on the CBS television network during prime time, but CBS refused to exhibit McGHEE and again told GF to sponsor COUNTRY COUSINS and HOGAN'S HEROES.

The McGHEE pilot was viewed by many prospective sponsors of the show as a television series on network television during prime time.

Proctor and Gamble (hereinafter P & G) and Philip Morris Company (hereinafter PM Co.), national television advertisers, had first call on the Monday, 9:30 P. M. , time slot on the CBS television network.

P & G and PM Co. viewed the McGHEE pilot and notified CBS that they wished to sponsor McGHEE as a television series on the CBS television network during prime time in the Monday, 9;30 P. M. time slot.

CBS again refused to exhibit McGHEE on its network and told P &G and PM Co. that if they wanted the 9:30 P. M. time slot on Monday they would have to sponsor a television series to be called SELENA.

At the time of the notification regarding SELENA to P & G and PM Co. , SELENA was not a television pilot but consisted of a five minute filmed presentation.

CBS had and has a financial interest in and control over

SELENA.

P & G and PM Co. advised CBS they would not sponsor SELENA as a television series on the CBS television network.

In February, 1965, CBS experienced a top management upheaval which resulted in the replacing of top management officials.

P & G and the PM Co. approached the new management of CBS and again requested McGHEE for the Monday night time slot on CBS television network.

CBS again rejected McGHEE and told P & G and the PM Co. that if they wanted the Monday night time slot they would have to sponsor a television series called HAZEL.

CBS had just obtained the rights to the television series HAZEL which had been on another network for a number of years and CBS at this time had a financial interest in and control of the HAZEL series.

P & G and the PM Co. agreed with CBS that they would sponsor HAZEL on the CBS television network on Monday evening at 9:30 P. M. during the 1965-1966 television season.

(b) Regarding McCLUSKEY

Plaintiff wrote, directed and produced the television pilot McCLUSKEY.

In February 1965 the PM Co. viewed McCLUSKEY.

CBS has a contractual relationship with the PM Co. which requires the PM Co. to sponsor television shows and series during prime time exclusively on the CBS television network.

The PM Co. notified appellant and others that they would sponsor the McCLUSKEY television series on the CBS television network during prime time for the 1965-1966 television season.

CBS viewed McCLUSKEY.

CBS notified the PM Co. that they would not exhibit McCLUSKEY on the CBS television network.

CBS advised the PM Co. that if they wanted prime time exposure on the CBS television network they would have to sponsor one of a half dozen other television shows in which CBS had a financial interest and control over.

PM Co. withdrew its offer to sponsor McCLUSKEY as a television series on the CBS television network during prime time.

(c) Regarding Control

CBS Films is producing and controls a substantial percentage of the television shows and series exhibited during prime time on the CBS television network.

Over the past five years, CBS has acquired a financial interest in and control over an ever increasing percentage of the television shows and series exhibited during prime time on its network until it now has a financial interest in and control over virtually every television show and series that will be exhibited on its television network during prime time in the 1965-1966 television season.

7. Effects of the Monopoly, Attempt to Monopolize, and the Unlawful Combinations, Agreements and Conspiracies.

The following effects have stemmed from the defendants' above described acts: competition among the three television networks for national advertising sponsors has been eliminated; national advertisers have been prevented from sponsoring prime time television shows on other networks; competition among the producers of prime time television shows has been eliminated; competition among the directors of prime time television shows has been eliminated; competition among the writers of prime time television shows has been eliminated; competition among the financial investors and owners of prime time television shows has been eliminated; competition among actors, cameramen, musicians and production crews of prime time television shows has been eliminated; competition among the distributors of television shows for prime time has been eliminated; competition among syndicators of television shows for prime time has been eliminated; competition among foreign syndicators of television shows for prime time has been eliminated; competition among the studios where prime time television shows are made has been eliminated; independent production companies of prime time television shows have been prevented from selling their shows to national advertisers for airing on CBS; independent writers, directors, producers, actors, camermen, musicians and crews have been prevented from having their work products in prime time television shows being aired on CBS; independent distributors, syndicators and foreign syndicators

of television shows for prime time have been prevented from distributing and syndicating prime time television shows; competition among the advertising agencies representing national advertisers have been prevented from dealing with independently produced and financed prime time television shows; competition among CBS' affiliates for prime time television shows has been eliminated; CBS affiliates have been prevented from deciding what will or will not become a television series during prime time.

The appellant Don McGuire has been damaged as a direct consequence of the defendants' activities as hereinabove described.

8. Prayer for Relief

Appellant prayed that the defendants' activities be adjudged to be in violation of Section 1 of the Sherman Act, Section 2 of the Sherman Act, and Section 3 of the Clayton Act; that the defendants be perpetually enjoined from such activities; that CBS and CBS Films be perpetually enjoined from producing, financing or owning prime time television shows while CBS is engaged in exhibiting television shows; that CBS be required to advise its affiliates of its financial interest in prime time television shows and to allow its affiliates to exercise independent judgment on programming; that appellant have judgment for his actual damages as ascertained and trebled to an amount equal to at least $6,000,000; that appellant have his costs and reasonable attorney fees against all defendants; and that appellant have such other and further relief as the court may deem just.

In summary, the complaint alleges that appellee GF and

defendants CBS and CBS Films, along with other co-conspirators not named as defendants, committed the following anti-trust violations:

(a) Combined and conspired in restraint of interstate trade and commerce in prime time television shows and series;

(b) Agreed to boycott and boycotted from sponsorship and exhibition during prime time on network television any television show or series that was independently produced, owned or controlled;

(c) Entered into exclusive dealing contracts between CBS and GF, by which GF agreed not to sponsor television shows or series during prime time on any other national television network than the CBS television network; and

(d) Unlawfully monopolized, attempted to monopolize and conspired to monopolize the interstate and foreign commerce of television shows and series to be exhibited on prime time on the CBS television network.

B. The Answer of Appellee General Foods

After service of the complaint, appellee GF filed its answer in the United States District Court [CT 20] (see Appendix I). GF in its answer admitted the following: that jurisdiction and venue were properly in the United States District Court for the Central District of California; that GF is a Delaware corporation with its principal place of business in New York, and that it does business in the Central District of California; that it markets

packaged foods and grocery products under well-known brand names and is a national television advertiser spending millions of dollars a year on television advertising during prime time; that it sponsors television series on the CBS network and pays CBS for time and talent for said series; that it has contracts with CBS, and that it uses advertising agencies in dealing with CBS; and that it advertises its products on CBS during prime time.

GF in its answer also admitted: that in 1964, it commissioned the production of eight television pilots; that Benton and Bowles, on behalf of GF, arranged for appellant McGuire to participate in the McGHEE and MULLIGAN pilots. However, GF denied, on the basis of not knowing, that the appellant wrote, directed and produced the McGHEE and MULLIGAN pilots and denied knowing if CBS had a financial interest in or control over McGHEE or MULLIGAN.

GF in its answer admits that it viewed the McGHEE and MULLIGAN pilots as well as the other six pilots it had financed and GF also admits that they arranged for CBS to see the McGHEE and MULLIGAN pilots in Los Angeles. GF also admitted that it agreed with CBS to participate in the sponsorship of COUNTRY COUSINS and HOGAN'S HEROES.

C. The Joint Answer of CBS and CBS Films

After service of the complaint, defendants CBS and CBS Films filed a joint answer in the United States District Court [CT 32] (See Appendix I). CBS and CBS Films in their answer

admitted the following: that jurisdiction and venue were properly in the United States District Court for the Central District of California; that CBS is a New York corporation with its principal place of business in New York and that it does business in the Central District of California; that CBS operates the CBS television network, consisting of five wholly owned television stations in New York, New York; Los Angeles, California; Chicago, Illinois; Philadelphia, Pennsylvania; and St. Louis, Missouri, and two hundred affiliated television stations throughout the United States; that CBS syndicates television films and operates foreign merchandising and distribution organizations of television shows and has subsidiary companies for such purposes in many foreign lands; that CBS Films is a wholly owned subsidiary of CBS; and that CBS produces, owns, has profit participations and investments in prime time television shows and as such is a competitor of appellant.

CBS Films admitted it is a California corporation with its principal place of business in New York, New York.

In their answer, it was admitted that CBS has contracts with national television advertisers including GF; that national television advertisers use advertising agencies in dealing with CBS, including GF; that television shows on CBS during prime time are in interstate and foreign commerce; that CBS network exhibits during prime time are mostly films made in California and sent in interstate commerce to 200 cities in the United States and elsewhere; that after a television series has been exhibited on the CBS network, said series are frequently syndicated world-wide by

CBS; and that GF advertises its products on CBS television network during prime time.

In the answer, CBS and CBS Films also admit: that they had no financial interest or control over McGHEE, MULLIGAN or McCLUSKEY; that they did have financial interest or certain rights in HOGAN'S HEROES, COUNTRY COUSINS, SELENA and HAZEL; that at the time involved, neither SELENA or COUNTRY COUSINS was a pilot; that GF agreed to broadcast commercials on COUNTRY COUSINS and HOGAN'S HEROES.

D. Discovery Proceedings

On February 21, 1966, appellant filed and served a comprehensive set of interrogatories on defendant CBS [CT 43-73]. On May 23, 1966, defendant CBS filed and served partial answers to these interrogatories. This date is prior to the grant of summary judgment to appellee GF. Since the granting of summary judgment to the appellee, additional answers to the interrogatories have been filed by defendant CBS, however, these additional answers were not before the trial court at the time of the ruling on the motion for summary judgment.

No pretrial discovery of any type, form or description was had by the appellant as to the appellee.

E. Appellee's Motion for Summary Judgment

On March 8, 1966, appellee moved for summary judgment [CT 74-113, 236-242].

Appellee's motion for summary judgment included the following: the motion; a memorandum of points and authorities in support of the motion; four affidavits in support of the motion; proposed findings of fact and conclusions of law in support of the motion; and a proposed summary judgment [CT 74-113, 236-242].

F. Appellant's Opposition to Motion for Summary Judgment

On May 27, 1966, appellant Don McGuire filed his opposition to appellee's motion for summary judgment [CT 187-235]. The opposition to the motion for summary judgment included the following: three affidavits and a memorandum of points and authorities in opposition to the motion for summary judgment. It is to be noted that the complaint was personally verified by the appellant.

G. Appellant's Subpoenas on Appellee's Affiants to Testify at the Hearing on the Motion for Summary Judgment; Appellee's Motion to Quash said Subpoenas; Appellant's Opposition to the Motion to Quash; the District Court's Order Quashing said Subpoenas.

Appellee, in support of his motion for summary judgment, filed four affidavits, including the affidavit of Edwin W. Ebel, the Vice-President for Advertising Services of appellee GF, and the affidavit of Lee Rich, Senior Vice-President of Benton and Bowles, Inc., in charge of Media, Radio and Television Departments.

On May 4, 1966, appellant caused a subpoena to be served upon Mr. Ebel in Los Angeles, California, and on May 6, 1966, appellant caused a subpoena to be served on Mr. Rich in Los

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Angeles, California; both subpoenas called for their appearance and testimony at the time of the hearing on the motion for summary judgment. Neither subpoena called for them to produce any records of any kind.

On May 13, 1966, appellee moved to quash the Ebel subpoena and for an order that no testimony be taken in connection with the hearing on the motion for summary judgment [CT 130]. A memorandum of points and authorities in support of said motion was also filed [CT 114-128].

On May 19, 1966, appellant filed his opposition to the motion to quash the Ebel subpoena and to the motion that no testimony be taken at the hearing on the motion for summary judgment [CT 133]. On May 23, 1966, in the United States District Court, a hearing was held on the motion to quash the subpoena and to prohibit any testimony on the hearing on the motion for summary judgment, and the District Court granted both motions [CT 135].

H. Hearing and Ruling on Motion for Summary Judgment

On May 31, 1966, in the United States District Court, a hearing was held on appellee's motion for summary judgment. This hearing consisted solely of the files and records in the case to date and the arguments of counsel. No witnesses testified.

On June 9, 1966, the District Court filed and entered summary judgment for appellee GF [CT 241]. The District Court signed the proposed findings of fact and conclusions of law that had been proposed by appellee GF without a single change.

I. Prior Unsuccessful Appeal: No. 21250 in this Court

On July 6, 1966, appellant filed his notice of appeal from the grant of summary judgment to appellee GF [CT 243]. Designations of the record on appeal were filed [CT 244-248].

Appellee moved in this Court to dismiss the appeal on the basis that the summary judgment granted appellee was a non-appealable order as there was no finding in the District Court that there was "no just reason for delay". Appellant opposed said motion. On November 3, 1966, Circuit Judges Chambers, Barnes and Ely ordered the appeal dismissed. This appeal was numbered 21250.

J. The Current Appeal

On November 9, 1966, appellant moved in the District Court to amend the summary judgment given in favor of appellee GF to include a certificate of appealability [CT 272]. On November 16, 1966, appellee filed its opposition to appellant's motion to amend the summary judgment [CT 284]. A hearing was held in the United States District Court on appellant's motion to amend the summary judgment, and on December 20, 1966, the District Court filed and entered its order amending the summary judgment given to appellee GF by including a certificate of appealability [CT 313].

On December 22, 1966, appellant filed his notice of appeal [CT 319]. The purpose of this appeal is to raise the validity of the District Court in granting summary judgment to the appellee; in making certain specified findings of fact; in drawing certain

specified conclusions of law; in quashing the subpoena on Mr. Ebel; and in granting appellee's motion that no testimony be taken at the hearing for summary judgment.

III

SPECIFICATION OF ERRORS

A. Appellant's Statement of Points to be Relied on Upon Appeal

In March of 1967, appellant filed in this Court his statement of points to be relied on in this appeal pursuant to Rule 17(6) of this Court.

B. Specification of Errors Relied Upon in this Appeal

Appellant relies upon the following specification of errors in this appeal:

(1) The District Court erred in granting summary judgment to appellee GF.

(2) The District Court erred in quashing the subpoena on Mr. Ebel calling for his appearance and testimony at the hearing on the motion for summary judgment.

(3) The District Court erred in granting appellee's motion that no testimony be taken at the hearing on appellee's motion for summary judgment and by so doing quashing the subpoena on Mr. Rich, who had not moved to have the subpoena quashed.

(4) The District Court erred in findings of fact Nos. 5, 7, 9, 11 and 12.

(5) The District Court erred in conclusions of law Nos. 1, 2, 3, 4 and 5.

IV

SUMMARY OF ARGUMENT

A. The trial court erred in granting appellee summary judgment.

1. Summary judgment in the trial court is not to be granted if there are genuine issues of material fact; it is not a substitute for the trial of disputed issues of fact; the moving party has the burden of proof; and it is rarely proper in complicated cases prior to discovery.

2. The test on reviewing a grant of summary judgment is to resolve all factual disputes and draw all inferences in favor of the party opposing summary judgment.

3. Summary judgment in anti-trust litigation should be used sparingly.

4. There were numerous disputed issues of material facts pointed out to the trial court which makes summary judgment inappropriate and erroneous.

5. The television industry has been studied

and investigated by numerous governmental bodies and their findings were put before the trial court, and they justify a denial of summary judgment.

6. Since the grant of summary judgment, there have been additional governmental reports which justify the reversal of the grant of summary judgment.

7. There is a genuine issue of fact as to whether GF agreed to boycott independently owned, controlled and produced shows and series during prime time.

8. There is a genuine issue of fact as to whether GF has an exclusive dealing arrangement with CBS relative to the sponsorship of television shows and series exhibited during prime time on network television.

9. There is a genuine issue of fact as to whether there is a forbidden tying arrangement between CBS and GF.

10. There is a genuine issue of fact as to whether GF has conspired, combined and agreed with CBS and other co-conspirators in restraint of trade.

11. There is a genuine issue of fact as to whether GF conspired with CBS and other co-conspirators to monopolize or attempt to monopolize television shows and series exhibited during prime time over the CBS television network.

B. The District Court erred in quashing the subpoena on Mr. Ebel, calling for his appearance and testimony at the

hearing on the motion for summary judgment.

C. The District Court erred in granting appellee's motion that no testimony be taken at the hearing on the motion for summary judgment, and by so doing quashing the subpoena on Mr. Rich.

D. Finding of Fact No. 5 is clearly erroneous.

E. Finding of Fact No. 7 is clearly erroneous.

F. Finding of Fact No. 9 is clearly erroneous.

G. Finding of Fact No. 11 is clearly erroneous.

H. Finding of Fact No. 12 is clearly erroneous.

I. Conclusion of Law No. 1 is clearly erroneous.

J. Conclusions of Law Nos. 2, 3 and 4 are clearly erroneous.

K. Conclusion of Law No. 5 is clearly erroneous.

V

ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING APPELLEE SUMMARY JUDGMENT.

1. Summary Judgment in the District Court.

Rule 56 of the Federal Rules of Civil Procedure governs the scope, function and applicability of summary judgment.

Rule 56(c) provides in pertinent part:

> ". . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

Summary judgment is not a substitute for the trial of disputed issues of fact.

In Griffeth v. Utah Power & Light Co., 226 F. 2d 661 (9th Cir. 1955), this Court said:

> "The trial court was vested with no discretion. The federal constitution gives a right of jury trial in a contested issue in a law action. This right is positive and should not be whittled away by decision of contested issues by the judge at hearings in camera before trial. The summary judgment rule does not confer this power even in a non-jury case. The remedy can be invoked only when complete absence of genuine fact issue appears on the fact of the record. Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubts upon the point must be resolved against the moving party. This Rule, on account of these limitations, was not

> intended to be used as a substitute for a regular trial of cases where 'there are disputed issues of fact upon which the outcome of the litigation depends.' This procedure is not, and of right ought not to be, a substitute for a trial by jury or judge. Plaintiffs had set up a claim of the negligence of defendant in respect to the release of water through their land. The defendant controverted the negligence. Even if the trial court believed there was no chance of recovery, he was bound to try out the issue thus contested. This is true even though the court may have believed some one issue was decisive."

The purpose of a hearing on a motion for summary judgment is to determine if there are any factual issues to be tried; and if there are disputed issues of fact, the motion must be denied.

Byrnes v. Mutual Life Ins. Co. of N.Y., 217 F.2d 497 (9th Cir. 1955), cert. denied, 75 S. Ct. 532, 348 U.S. 971.

When the litigation involves complicated issues of fact which must first be resolved in order to adequately deal with difficult questions of law, summary judgment should be denied.

Miller v. General Outdoor Advertising Co., 337 F.2d 944 (2nd Cir. 1964);

S. J. Graves & Sons Co. v. Ohio Turnpike Commission, 315 F.2d 235 (6th Cir. 1963),

cert. denied 84 S. Ct. 65, 375 U.S. 824;

Clarke v. Montgomery Ward & Co.,

298 F. 2d 346 (4th Cir. 1962).

The party that moves for summary judgment has the burden of demonstrating that there is no genuine issue of fact, and any doubt about the existence of such an issue must be resolved against the moving party.

Byrnes v. Mutual Life Ins. Co. of N. Y., supra;

Cox v. Amer. Fidelity & Cas. Co.,

249 F. 2d 616 (9th Cir. 1957).

Where the pleadings set forth issues which are not attacked by affidavits in support of a motion for summary judgment, then the motion in that regard should be denied. This is particularly applicable when the complaint is verified, as in this case.

Albert Dickinson Co. v. Mellos Peanut Co. of Ill.,

179 F. 2d 265 (7th Cir. 1950).

In Poller v. CBS, Inc., et al., 82 S. Ct. 486, 368 U.S. 464 (1962), Justice Clark, writing for the majority and reversing the trial court's grant of the defendant's motion for summary judgment, said:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc.

This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)."

. . .

"It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on the record that 'it is quite clear what the truth is.' Certainly there is no conclusive theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark

of 'even handed justice'."

Justice Harlan, writing a dissenting opinion in the same case, pointed out:

> "In this case petitioner, the party opposing the motion, had complete access by means of pretrial discovery to all the evidence he could marshal at a trial on the merits. Neither his cross-examination of hostile witnesses nor his own direct testimony by way of deposition and affidavit produced any evidence which would indicate that the respondents sought to accomplish anything more than to purchase for CBS an UHF station in Milwaukee."
>
> . . .
>
> "Despite the ample opportunity afforded him by the availability of pretrial discovery procedures, petitioner, as will be shown, was able to produce no evidence to support his charges that a conspiracy, narrow or far-reaching, had been hatched. He should not be permitted to proceed to trial just on the hope that in the more formal atmosphere of the courtroom witnesses will revise their testimony or that a clever trial tactic will produce helpful evidence."

In the civil anti-trust case of United States v. Diebold, Inc., 82 S. Ct. 993, 369 U.S. 654 (1962), the Supreme Court in a per

curiam opinion reversed the trial court's grant of summary judgment, and said:

> "On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of International Shoe Co. v. Federal Trade Comm'n., it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment."

2. The Test on Reviewing a Grant of Summary Judgment

An appellate court, when reviewing a grant of summary judgment, must resolve factual disputes in the manner most favorable to the party opposing the motion for summary judgment, and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to appellant.

Frey v. Frankel, 361 F.2d 437 (10th Cir. 1966);

Swain v. Isthmian Lines, Inc.,

360 F.2d 81 (6th Cir., 1966);

Parlane Sportswear Co. v. United States,
359 F. 2d 974 (1st Cir. 1966);
Jobson v. Henne, 355 F. 2d 129 (2nd Cir. 1966);
Guidry v. Continental Oil Co., 350 F. 2d 342
(5th Cir. 1965);
United States v. Bob Crislaw, Inc., 341 F. 2d 887
(7th Cir. 1965);
Mahler v. United States, 306 F. 2d 713
(3rd Cir. 1962), cert. denied 83 S. Ct. 290,
371 U. S. 923;
Libby v. L. J. Corp., 247 F. 2d 78
(D. C. Cir. 1957);
Carr v. City of Anchorage, 243 F. 2d 482
(9th Cir. 1957).

3. Summary Judgment in Anti-trust Litigation

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

Justice Clark so wrote in Poller v. CBS, supra.

In White Motor Co. v. United States, 83 S. Ct. 696, 372 U. S. 253 (1963), a civil anti-trust suit, the Supreme Court, in

reversing a grant of summary judgment, said:

> "Summary judgments have a place in the antitrust field, as elsewhere, though as we warned in Poller v. Columbia Broadcasting System [citation omitted], they are not appropriate 'where motive and intent play leading roles'."

See also:

Crest Auto Supplies, Inc. v. Ero Manufacturing Co., 360 F. 2d 896 (7th Cir. 1966);

South Carolina Council of Milk Producers, Inc. v. Newton, 360 F. 2d 414 (4th Cir. 1966);

Tillamook Cheese & Dairy Assn. v. Tillamook County Creamery Assn., 358 F. 2d 115 (9th Cir. 1966).

4. Disputed Issues of Material Facts as Pointed Out to the District Court.

In the District Court, appellant in his opposition to the motion for summary judgment [CT 187-236] pointed out the following fact issues that were put into dispute by the pleadings and the affidavits:

1. Is defendant General Foods exclusive to defendant in the sponsorship of television series exhibited during prime time?

2. Did defendant General Foods have an option on the

McGHEE show?

3. Did defendant General Goods pick up the option on the McGHEE show?

4. Did defendant CBS refuse to allow defendant General Foods to sponsor McGHEE on defendant CBS' during prime time?

5. Did defendant CBS tie the sale of network time to the purchase of CBS-owned and controlled shows?

6. Did defendant General Foods agree with defendant CBS to boycott independently produced television shows for network exhibition during prime time?

7. Did defendant General Foods agree with defendant CBS to restrain trade?

8. Is it defendant CBS' policy to exhibit only those television series in which it has financial interests and control?

9. Did defendant General Goods agree with defendant CBS to attempt to monopolize the exhibition of television series shown during prime time?

10. What was defendant General Foods' state of mind in its dealings with defendant CBS?

5. Background of the Television Industry as Pointed Out to the District Court.

In the District Court, appellant in his opposition to the motion for summary judgment [CT 187-236] pointed out that numerous governmental committees and agencies had spent years delving

into the complexities of network television, and appellee GF, as one of the world's largest national television advertisers, participated in many of these investigations. In fact, Edwin Ebel, whose affidavit was filed in support of the motion for summary judgment, testified before one of these investigating bodies and portions of his testimony were set out in appellant's opposition [CT 187-236].

On March 13, 1957, the Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, filed their report on The Television Broadcasting Industry. Honorable Emanuel Celler is the Chairman of both the Committee on the Judiciary and the Antitrust Subcommittee, and this report came after extensive hearings. Following are some excerpts from this report:

Regarding network programing:

> "Production of a television network program may be undertaken by an independent producer, by the network itself, or by a producer in some way affiliated with the network organization.
>
> "The wholly independent producer assembles the program 'package' without financing, affiliation, or profit participation on the part of the network and attempts to license its show for network broadcast either to an advertiser or to the network itself.
>
> "When the network performs the producer function, it puts the entire show together, assembling all essential elements, such as technical staff, writers, talent and facilities.

> "When the network is not the producer, however, it frequently has an initial financial interest in the program, in the producer, or in both. Such network-program interest or network-producer interest takes a variety of forms. The producer may put the show together for the network for a fixed price or for a percentage of the profits to be derived by the network from broadcast; the producer may be a separate corporation in which the network owns a substantial stock interest, or the network may bring its own program package into the studio of a producer and pay him a fixed fee under a facilities contract for stage space and technical services." (pages 40-41).

The report then points out that CBS in the fall of 1956: (1) owned 29.6% of all programs which was 18.8% of prime evening hours programs; (2) had financial interest in an additional 28% of all programs which was 31.7% of prime evening hours programs; and (3) that these two total that CBS had a financial interest in 57.6% of all programs which was 50.5% of prime evening hours programs.

> "Independent producers often encounter difficulties in getting their shows on a network. They advance two principal reasons for this. They contend that when they attempt to sell a program directly to a network they are met by demands for so large a

profit participation that the transaction becomes financially infeasible. They also contend that networks tend to give preference to programs in which they have a financial interest.

"The exploitation of a network program offers three potential opportunities for profit. First, of course, the amount received from the sponsor may exceed the cost of production. Second, the sponsor usually pays for the right to broadcast the program on television for the first time, leaving the owner free in case of filmed programs (including live programs that have been filmed) to sell to other interested parties the right to rerun all or part of the program on television after the first run. Third, profits also inhere in subsidiary or merchandising rights in some programs. These rights involve exploitation of the popularity of the program by licensing the use of its name, or the name or likeness of its star and/or other members of the cast, to manufacturers and distributors of commercial products.

"In selling programs to network, independent producers prefer to license the first-run exhibition rights and retain the rerun and subsidiary rights. Under such an arrangement, the network's potential profit from the program would lie in its time charges and in the excess, if any, over cost for which the

> network sold the program to a sponsor, leaving the producer free to sell rerun and merchandising rights to others." (page 43)
>
> . . .
>
> "Because the networks retain the right to determine what programs they will televise, sales of network programs by independent producers to advertisers are made subject to network approval. Several independent producers have taken the position that when a network and an independent producer both wish to sell the advertiser a program for the same time period, there is a tendency on the part of the network to disapprove the independent's production on some such ground as the requirements of 'good programing' or 'the public interest'." (page 50)

For an amazing coincidence to the allegations in the complaint, note the following fact situation as reported by the subcommittee:

> "One of a number of alleged instances of this tendency brought to the committee's attention by independent producers involved a program called You Can't Take It With You, produced by Screen Gems, Inc., and based on the Kaufman and Hart Pulitzer prize-winning play and Academy Award winning motion picture of the same name. Mr. Ralph M. Cohn,

vice president and general manager of Screen Gems, testified that in the late spring of 1955 his company completed the initial program of a proposed series and interested Carter Products and its advertising agency, Sullivan, Stauffer, Colwell & Bayles in the series. Carter Products had been sponsoring a program on CBS called Meet Millie. According to Mr. Cohn, the sponsor had been quite satisfied with the show but had been notified by CBS that it would have to be discontinued. Carter, free to bring in any other program for consideration by CBS, submitted You Can't Take It With You. CBS informed the advertiser that this program was not acceptable.

"Thereafter, Mr. Donald D. Stauffer, of the advertising agency, submitted scripts of future episodes in the series to CBS in an effort to induce CBS to change its mind. Executives of Screen Gems met with executives of CBS for the same purpose.

"CBS planned to fill the Carter Products time period with a CBS-owned program entitled 'Joe and Mabel.' Having refused to allow Carter Products to continue Meet Millie and having rejected You Can't Take It With You, CBS offered Carter Products Joe and Mabel, which the advertiser accepted.

"Mr. Cohn further testified that shortly

> before air date, CBS executives finally saw the first few episodes of Joe and Mabel, the program they had chosen, and realized for the first time that 'it was unfit for human consumption.' As a consequence, Meet Millie, which it may be observed is also a CBS-owned show, was brought back on the air." (page 51)

Change the name of the program from "You Can't Take It With You" to "A Man Named McGhee" and it would be a rerun of the complaint herein. It also indicates a conscious, intentional course of conduct and anyone spending millions of dollars on television advertising a year cannot be blind to these facts.

The report cites another such incident:

> "A second instance in which an independently produced program was rejected in favor of a show in which a network was financially interested involved Four-Star Playhouse, a film series of half-hour dramas featuring Dick Powell, David Niven, Charles Boyer, and Ida Lupino, and sponsored alternately by Singer Sewing Machine Co. and Bristol-Myers. The program won a number of awards; its audience ratings were good, and the sponsors were most happy with it.
>
> "In February 1956, when Four-Star Playhouse had been on CBS for 4 years, Young & Rubicam, the

advertising agency, notified the network that the sponsors wanted to renew the show for another year. CBS replied that Four-Star Playhouse was no longer acceptable because the network was planning to program a series of dramatic shows to be called Playhouse 90 that would last an hour and a half and would absorb the half-hour slot that was occupied by Four-Star Playhouse. Despite the advertisers' dissatisfaction, CBS offered them the alternative of joining in sponsorship of Playhouse 90, or losing their time period. Faced with this choice, the advertisers accepted sponsorship of the new program.

"It may be noted the live portions of Playhouse 90 are produced by CBS, which also shares in all profits from the film portion which is produced by Screen Gems, Inc.

"Dr. Stanton testified that Four-Star Playhouse was removed from the network solely because the network wanted to strengthen its show. Notwithstanding Dr. Stanton's explanation for the CBS rejection of You Can't Take It With You and its removal of Four-Star Playhouse, the fact remains that both shows had been independently produced and that both were put aside in favor of network-owned properties over the objection of advertising sponsors." (pages 51-52)

As proof of the consciousness of this activity, the report cites an interesting meeting as follows:

> "The minutes of a special program planning meeting of the Columbia television division, held on February 25, 1956, seem significant in this context. These minutes indicate that the purpose of the meeting was to select new programs for the fall 1956 schedule and that 27 proposed programs were presented for consideration. Fifteen of these were CBS programs; 12 were programs of outside producers. The minutes further show that not one of the 12 programs in preparation by outside producers was selected by the meeting for CBS programing, whereas several of the programs in preparation by CBS were proposed for placement in the schedule." (page 52)

From these events, the sub-committee drew the following conclusions:

> "The question before the committee, not completely resolved by the record, is whether the television networks tie sale of network and network-owned station time to the sale of network owned or controlled programs. The disparate bargaining power enjoyed by the networks by virtue of their control of network time, places them in a position where they can demand and obtain substantial financial

concessions from independent producers. These concessions consist not only of participation in any profits from initial broadcast. They often include a share in rerun and subsidiary rights. They sometimes include stock interest in the producing entity itself.

"Practices such as these, which indicate use of control of network time as a lever for obtaining a financial interest in programing, can have dangerous anticompetitive consequences. They tend to deny independently produced programs access to the national networks unless the network is given financial interest. They tend to afford programs in which the networks have a financial interest an artificial advantage over competing programs. They tend to deprive advertisers of access to independently produced programs and thus limit them in the exercise of program selection.

"Existence of such practices would take on some of the characteristics of conditions condemned by the Supreme Court in the Paramount Pictures case. There, major motion-picture-producing organizations through strategic theater control obtained immeasurable competitive advantage over rival film producers. Such conditions led the Court to require divorcement of the defendants' production operations from their theater operations." (page 54)

These very practices constitute the violations of the antitrust laws alleged in the instant complaint. In fact, in the 10 years that have elapsed since this report the practices have intensified and expanded.

Network time sales and discounts.

> "The gross time charged billed the network advertiser is the aggregate of the network time rate of each of the stations used by the advertiser, less certain quantity discounts which are borne by the network and not by the affiliated station. This station network time rate is fixed by the network and is set forth in the affiliation contract. Under that contract, the network may change the rate at any time, with the right reserved the station to cancel the affiliation if its rate is decreased." (page 61)

. . .

> "Each network allows advertisers a variety of quantity discounts. Thus, CBS allows, among other things, a station-hour discount, an annual discount, and an overall discount, up to a maximum of 25 percent of total gross billings. A station-hour discount, ranging from 2-1/2 percent to 15 percent based on the number of station hours actually used, is granted an advertiser using network broadcasts for 26 or more consecutive weeks.
>
> "In addition, an advertiser using the CBS

network for 52 consecutive weeks is entitled to a discount of 10 percent of total gross time charges, while an advertiser using the network consecutively for 26 alternate weeks is entitled to a discount of 5 percent of total gross time charges.

"In lieu of a station-hour and annual discount, CBS allows an advertiser buying a minimum of $100,000 of station time for 52 consecutive weeks an overall discount of 25 percent on his total time charges." (page 62)

. . .

"As to how the discount system of a particular network operates in actual practice, the following testimony of Dr. Frank Stanton, president of CBS, is pertinent:

> COUNSEL. Now, on the basis of the CBS discount system, it is correct, is it not, that an advertiser who, for example, uses a weekly minimum of $100,000 gross billing for station time during 52 consecutive weeks of an established overall discount year receives a 25 percent overall discount?
>
> MR. STANTON. In lieu of the other discounts.
>
> COUNSEL. He does?
>
> MR. STANTON. Yes. sir.

COUNSEL. This overall annual discount would in effect be applicable to each of the several programs sponsored by the advertiser, whether the program appeared in class C time, class B time, or class A time; is that correct?

MR. STANTON. That is correct.

COUNSEL. To illustrate, Dr. Stanton, how the discount system works, let us take the Proctor & Gamble account in 1955. It is not correct that since that advertiser had over one-half million dollars in average weekly billings and can qualify for the 25 percent overall discount, it follows that Proctor & Gamble received this 25 percent deduction for all its programs including, for example, Guiding Light, which runs for 15 minutes during the day in class C time, and for Topper, which ran for 30 minutes in the evening in class A time; is that right?

MR. STANTON. That is correct.

COUNSEL. Therefore, on an overall basis, a large advertiser like Proctor & Gamble would receive discount deductions of about $135,000 a week, 25 percent of $544,300; is that right?

MR. STANTON. I do not quarrel with

> your computations.
>
> COUNSEL. They are taken from your computations.
>
> MR. STANTON. Right. I did not think we gave you the dollar discounts.
>
> COUNSEL. We worked out the amount of the discount ourselves. Would it be correct to say that there are at least a dozen such large corporations that received a 25-percent discount on their weekly gross billing in 1955, such as Kellogg, Pillsbury Mills, Westinghouse, Liggett & Myers, Lever Bros., General Mills, Bristol-Myers, R. J. Reynolds, American Home Products, Colgate-Palmolive, Toni, and General Foods?
>
> MR. STANTON. I would have to examine the list, but if you have done so I accept your word. At the present time I think there are six advertisers on the overall discount basis."
>
> (page 64)

These discounts suggest a practical economic reason why a national television advertiser such as defendant General Foods would be exclusive in the sponsorship of television shows with one network.

During the hearings prior to this report, Frank Stanton,

President of CBS, stated:

> "We have found, by and large, that the greatest assurance of . . . quality programing is for us to do it outselves." (page 900, Hearings Before the Anti-Trust Subcommittee)

Mr. Donald Turner, now the Assistant Attorney General in charge of the Anti-Trust Division of the U. S. Department of Justice, along with others, filed a legal memorandum on behalf of Los Angeles California television station KTTV in 1956. In this memorandum he observed:

> "Thus, the independent program producer finds himself in the following dilemma:
>
> "(a) He must distribute his program on a national scale during prime viewing time in order to recover the costs of production and a reasonable profit.
>
> "(b) Because of the time-option provisions of network affiliation agreements, the must-buy policy, and the economic power of the network companies over the affiliated stations, prime viewing time on a national scale can today be cleared effectively only through the networks.
>
> "(c) The independent program producer, or the national advertiser who wants to sponsor his program, must, therefore, deal with the network company in order to obtain national distribution

during prime viewing time.

"(d) The network company, however, is producing its own programs and trying to sell its own programs to the same sponsor.

"(e) As a result, the independent program producer can only sell through his own major competitor - the network company - and scales can be made only when the network is unable to persuade the advertising sponsor to take a network-controlled show instead." (page 5542)

"The Supreme Court opinions in the movie cases are almost exact legal and factual precedents for determining whether the conduct of the networks and their affiliated stations amounts to illegal restraints of trade and attempts to monopolize the television industry. As shown below, these opinions clearly establish that the existing time option provisions of the network affiliation agreements and the must-buy policy of NBC and CBS are illegal restraints of trade under section 1 of the Sherman Act, and that the use of these restrictive arrangements constitutes an illegal attempt to monopolize under section 2." (page 5546)

In 1955 a study of network broadcasting was initiated and a Network Study Staff engaged in a two year study of the subject,

financed by Congress. On January 27, 1958, Honorable Oren Harris, Chairman, House Committee on Interstate and Foreign Commerce had this report submitted and printed. Dean Roscoe L. Barrow of the University of Cincinnati Law School headed the network study staff, and this report, of some 737 pages, is referred to as the Barrow Report. There are a number of cogent comments, studies, conclusions, and recommendations in this report which have a direct bearing on the instant case.

On May 8, 1963, Oren Harris, Chairman, Committee on Interstate and Foreign Commerce, filed the Committee's report entitled "Television Network Program Procurement". This is actually the report of the Federal Communications Commission's Office of Network Study. Mr. Edwin W. Ebel testified at the hearings and his testimony is summarized in the report as follows:

> "(iii) Edwin W. Ebel, advertising vice president of General Foods Corp., the third largest advertiser in television, observed that 'there very definitely is' a trend toward 'networks' owning shows or acquiring licensing rights to shows.' Up to the time of his testimony, this tendency had not affected his company's ability to get the kinds of shows they desired, but Ebel was 'a little apprehensive' for the future because 'as the networks acquire more and more control' in the sense of contracting with producers, he 'could see difficulty.' But he 'not too alarmed about it,' as the effect will depend 'upon the attitude the networks take

> in owning their shows.' Ebel agreed that network shows were turning in the 'direction of' conformity, stereotypes, etc. But this is true 'not only of television, but of other things.' One of the problems has been 'a rush of others' to follow 'one kind of thing that becomes successful.' He believes that network schedules will turn in the direction of diversity and balance and that, at the time he testified, there was 'a great opportunity' for more 'meaningful drama' in network schedules." (page 82)

On July 2, 1965, Part II of the report from The Office of Network Study of the Federal Communications Commission was released. In the introduction and Summary to this 864 page report, it is stated:

> "The record of our inquiry discloses an almost complete concentration of economic and cultural control - a virtual 'monopoly' or 'triopoly,' if you will, of production and procurement of television programs - presently in the hands of the managers of the three national networks. This has come about over the past six or seven television seasons through the progressive operation of program procurement practices through which network managers either produce the programs themselves or, in the more usual case, finance program production by others. In the latter case, network managers almost invariably acquire exclusive rights

to first-run network managers almost invariably acquire exclusive rights to first-run network exhibition directly from the 'independent' producer - frequently a Hollywood film company - 'slot' the program or film series (more usually the latter) into choice evening time and sell advertising participation to several sponsors. Often network managers 'buy' the series and place it in the schedule before sponsorship has been obtained and assume the economic 'risk' of sale of advertising positions in the program. Many of the programs procured in this fashion are hour-long film series designed to produce bulk circulation. Advertising is sold on the basis of 'minutes' to several sponsors on the same program hour.

"In addition to proprietary control of such programs through the first-run license, network managers - usually as a quid pro quo for initially financing the 'pilot' but sometimes merely as 'compensation' for assumption of the 'risk' of 'sale' to advertisers - in 'bargaining' with the producers, insist upon and frequently obtain separately or in combination the right to share in profits from subsequent runs; the right to distribute the programs or series in domestic syndication and in foreign markets; the right to share (usually 50 percent for a term of years or in perpetuity) in the profits from domestic and foreign syndication sales; exploitation rights and

shares of profits in merchandizing; and the right to share in other nonbroadcast interests (e. g. motion pictures, books, magazines, phonograph records, and plays). Also, these 'bargains' usually accord - either by contract or acquiescence - network managers the 'right' to participate in the creative process (subject matter, writing, casting, etc.) to the extent necessary to assure themselves and mass advertisers that the program or series will be initially designed to attract large circulation and that subsequent episodes of a series will adhere to the 'formula' originally set. The objective of this 'creative control' in large measure, is to attract maximal circulation and to create desirable 'marketing implements' for national advertisers of low cost, mass consumed, packaged goods. These procurement techniques have been developed by network managers as part of a highly sophisticated and 'expert' method (harnassed to ratings and other audience measurement data) of constructing and controlling network schedules in such a way as initially to create and subsequently to maintain through a given evening the highest possible circulation and the lowest possible cost-per-thousand. This procurement process is sometimes referred to as the 'slide rule' method of programing and, at present, prevalent in network television."

. . .

"Formerly as much as one-half of network evening schedules was composed of programs - mostly half-hour series - produced by independent producers and licensed directly to advertisers. In these cases network managers did not play a direct financial, proprietary or creative role in the production process. The first-run exhibition rights were purchased by advertisers from the independent producers. The approval of network managers as to appropriateness, quality, good taste, decency, etc., was obtained, time was purchased and the programs were exhibited as part of network schedule.

"This kind of procurement had economic advantages for independent producers. Sponsors practically never sought to acquire syndication, foreign sales, or other subsidiary rights in such program series. These rights were almost invariably retained by the independent producers and constituted valuable commercial assets which (either through exploitation by them or sale to other program distributors) contributed to their stability an and commercial profitability. Indeed, the importance of these rights to independent producers can best be appreciated from the testimony of several producers that in many, if not most, instances they do not recover their production costs from the network run of a program series but must look to syndication and foreign sales to 'make them whole' and show a profit.

"In recent years (since about 1957-58) the market in which an independent television program producer can sell his product has been progressively contracted. The percentage of independently produced and financed programs in network schedules has declined sharply. Such programs have been crowded out of network schedules by program series - in many cases hour-length film segments - supplied by 'independents' but financed and controlled, both economically and creatively by network managers. On <u>all</u> networks in 1964, 93.1 percent of total evening hours (6 p.m. to 11 p.m.) was occupied by programs either produced or under the direct economic control of network managers. Only 6.9 percent was independently produced, financed, and licenses directly to advertisers." (pages 13-14)

. . .

"Network managers insisted in their testimony that rising costs in program production and basic changes in advertising techniques have required them to assume the 'burden' of greater financial and creative control of programing. They say that they <u>must</u> now, to a much greater extent than was formerly the case, undertake the 'enormous' financial risks in providing a program schedule through which national advertisers may 'circulate.' They justify their acquisition of syndication,

foreign sales and other subsidiary rights as 'good business' and just rewards of their 'risk' in financing programing and assuming the 'responsibility' to obtain advertising support. They point out that they 'commit' many millions of dollars in the production and 'purchase' of programs before sponsorship for them has been obtained. They attempt to 'minimize' these 'risks' by financial return to themselves through sharing the producer's 'profits' from network use and subsequent uses of the program and, for the same reasons, acquire syndication and foreign distribution rights when they can. Despite this, they claim to sustain large 'losses' in the production and procurement of programing which must be recouped from time sales.

"As we have seen, the agency executives in 1959 said that it was network managers who initiated the present programing practices in their own interest and presented the resultant 'slotted-in' schedules to advertisers - many of whom had, to that time, followed the practice of providing their own programing - as fait accomplies. However, whomever may be the cart or the horse, the expressed misgivings of network managers that the switch to hour-long programs and multiple sponsorship placed economic burdens on them which threatened their future profitability seem to have been unduly pessimistic. Since that testimony was given in

1962, reported total net income of network managers (from network operations) has reached progressively higher levels and has almost trebeled - from $24.7 million in 1961 to $60.2 million in 1964." (page 17)

. . .

"It is indicated that alternate sources of first-run programs appropriate for nighttime exhibition have been drastically reduced, if they are not 'virtually non-existant.' at present. At most, they appear to constitute a mere pittance of the maximum of 'diverse and antagonistic' program sources which a truly competitive national television industry might sustain and support.

"The restrictive control exercised by network managers over network programs is both economic and creative. Also they control the production and supply - and to a considerable degree the distribution of programs in the nonnetwork or syndication market." (page 19)

As a result of the two reports from the Federal Communications Commission, on March 22, 1965, the Federal Communications Commission proposed a new rule called the 50-50 rule which would:

"(1) eliminate network corporations from the domestic syndication business, and permit foreign distribution by networks of network produced programs only

(2) prohibit network corporations from acquiring

> syndication rights and foreign distribution of independently produced programs
>
> (3) prohibit a network corporation from offering a weekly evening program schedule in which more than 50 per cent of the time, or a total of 14 hours per week, whichever is greater, is owned or controlled by the network. Newscasts, news interviews, special news programs, on the spot coverage of news events, and sustaining programs are excluded."

The Federal Communications Commission is currently receiving comments from interested parties. Representative Emanuel Celler, Chairman of the Committee on the Judiciary, filed a written comment before the Federal Communications Commission regarding this proposed rule, and while commending the rule as a step in the right direction, he concluded: "There should be no permissive network ownership of programs." (page 3). He further pointed out as his opening two paragraphs:

> "This proceeding is long overdue. In 1957, the House Antitrust Subcommittee, in its report on its extended investigation into antitrust and monopoly problems in the television industry, noted the growing proclivity of the networks to abuse their power over broadcast time to extract concessions and profit participation from program producers, or to force an unfair tie-in of network owned

programs on advertisers. At that time the networks already had muscled their way into 67.2 per cent ownership or control of the evening network television schedules. The independent program producer at that time, however, still accounted for 32.8 per cent of the programs.

"Now we see the fruits that have been borne as a result of the failure to heed the Subcommittee's warnings of the need for vigorous action to curb network program abuses. By 1964, 93.1 per cent of all network programming between 6:00 and 11:00 p.m. had become network owned or controlled. The independent programs outside direct network ownership or proprietary control were reduced to a paltry 6.9 per cent."

6. Additional Background of the Television Industry

In December, 1966, Subcommittee No. 6 to the Select Committee on Small Business, House of Representatives, 89th Congress, 2nd Session, submitted its report entitled Activities of Regulatory and Enforcement Agencies Relating to Small Business (Federal Communications Commission), House Report No. 2344.

The following is a critical excerpt from this report:

"Testimony established that of the 26 prime-time programs not produced by the network as of November, 1965, there were only 2 in which CBS did not own some

interest:

"COUNSEL: There are only two programs that are produced by others and licensed directly to the advertisers, is that correct, sir?

"MR. REYNOLDS. On this chart?

"MR. IANNUCCI. Well, there are two programs. But there are two other programs which are half and half, sir.

"COUNSEL: They are hybird, that is correct, sir?

"MR. IANNUCCI. Right.

"COUNSEL. In which the producer retains 50 percent in one case, the advertiser in the other, and the network has 50 percent?

"MR. IANNUCCI. I don't know what you are talking about when you talk about those percentages. If I may state it, there are two programs in the schedule which are directly licensed 100 percent to the advertiser and there are two other programs, 50 percent of which or alternate weeks of which are licensed to the advertiser and 50 percent which on alternate weeks of which are licensed to the network for resale purposes.

"COUNSEL. I am trying not to reveal the names of the shows. Are these the two footnotes you are referring to, sir?

"MR. IANNUCCI. I don't know what chart you are

referring to.

"COUNSEL. It is your chart 1.

"MR. IANNUCCI. Our chart 1? The shows I think we are discussing, 'Gomer Pyle' is directly licensed to us by General Foods. 'Andy Griffith' is licensed to us, not licensed but they have a license from the packager and in turn they buy time on our network. Then the 'Smothers Brothers', half of which is acquired by license directly from the packager by Alberto Culver, and on the alternate week we acquire the license for resale purposes, and the other show I think is the 'Lucille Ball show,' in which that same situation as for the 'Smothers Brothers' obtains.

"COUNSEL. So there are only two in which you have absolutely no financial interest.

"MR. IANNUCCI. Well, financial interest doesn't necessarily follow in view of the fact that we have a license from a packager. I don't know what you mean by financial interest. Are you referring to financial interest in the sense that we have a financial interest obviously in the time side of any sale?

"COUNSEL. I am talking first of all, of first network runs, sir. I am referring specifically - and I will use your arithmetic without revealing the name of program - to a program in which profits divided from sales for first running 50 percent to CBS and 50 percent

to the supplier. Programs in which CBS receives 100 percent of the profits -

"MR. IANNUCCI. You are talking program profits now.

"COUNSEL. For openers; yes, sir.

"MR. IANNUCCI. If there is a program profit, which is always -

"COUNSEL. An open question, that is correct, sir?

"MR. IANNUCCI. Yes.

"REP. WELTNER. You have only two shows that fall into the category where the advertiser supplies the whole item, buys the time from the network.

"MR. IANNUCCI. That is right.

"REP. WELTNER. All of the others are subject to some kind of licensing.

"MR. IANNUCCI. Licensing arrangement.

"REP. WELTNER. Or some kind of sharing proposition.

"MR. IANNUCCI. Excuse me, sir?

"REP. WELTNER. Some kind of licensing or some kind of sharing proposition?

"MR. IANNUCCI. A licensing arrangement, and in the licensing arrangement you would cover the aspects of the arrangement as you would in any arrangement.

"REP. WELTNER. And the reason for that is the explanation contained in Mr. Reynold's statement,

insofar as the spreading of risk among advertisers and the avoiding of what he calls the all the eggs in one basket proposition."

Appellant's Interrogatory No. 17, put to defendant CBS and its answer are set forth below:

"INTERROGATORY NO. 17.

"State the number of television series on the CBS television network during prime time at the start of the 1965-66 television broadcast year that defendant CBS did not have a financial interest in.

"ANSWER TO INTERROGATORY NO. 17.

"There were at the start of the 1965-1966 broadcast season 12 series broadcast during prime time over facilities of CBS Television Network as to which CBS had no right to receive profits or to use or license the series or elements thereof, excepting of course, rights relating to network broadcasts." [CT 43-73, 136-186].

7. There is a Genuine Issue of Fact as to Whether GF Agreed to Boycott Independently Owned, Controlled and Produced Television Shows and Series for Exhibition During Prime Time.

The facts in the light most favorable to appellant are: GF paid to have eight television pilots made; appellant wrote, directed and produced two of the eight pilots; GF, after viewing the eight

pilots, exercised its option and announced that it would sponsor McGHEE as a television series on CBS television network; GF tried several times to get CBS to exhibit McGHEE as a series but CBS refused; CBS tried to get GF to sponsor two series in which CBS had financial interests and controls (one of which was not even a pilot, but merely a title and idea); GF agreed with CBS that GF would sponsor the CBS shows.

Does this agreement constitute an agreement in restraint of trade? Does this agreement constitute an agreement to boycott? In view of the history and development of CBS' ever increasing percentage of financial interest and control over television shows and series that it exhibits over its network during prime time (supra), and the recognition that this development took place while GF was consistently one of the largest advertisers over the CBS television network during prime time, and that GF was obviously aware of the CBS policy that it would not exhibit shows that it didn't own, and the fact that network television time during prime time is a very limited commodity which has been a seller's market for many years, invites only one conclusion: there is a triable issue of fact involved.

Appellant's sworn recitation of facts relating to McGHEE and P & G and PM Co. are completely uncontradicted in the record and corroborate and confirm the McGHEE facts relative to GF. Briefly stated, the facts are as follows: after GF was unable to get McGHEE on CBS and instead agreed to sponsor two CBS shows, P & G and PM Co. viewed the McGHEE pilot; P & G and PM Co.

told CBS they wished to sponsor McGHEE as a television series during prime time on the CBS television network; CBS refused; CBS tried to get P & G and PM Co. to sponsor a non-existent show in which CBS had financial interests and controls, in the end P & G and PM Co. agreed with CBS that they would sponsor it as a television series on the CBS television network; CBS refused.

The net results of these facts may be summarized as follows: appellant had three national advertisers who were ready, willing, able and desirous of sponsoring McGHEE as a series on network television; McGHEE did not get on the air, but three CBS shows got sponsors; appellant had a national advertiser ready, willing, able and desirous of sponsoring McCLUSKEY as a series on CBS television network; McCLUSKEY did not get on CBS, but another CBS show was sponsored.

Why didn't GF take the McGHEE show to the American Broadcasting Company television network and/or to the National Broadcasting Company television network and sponsor it over their facilities? This subject has a direct bearing on the issue of group boycott, but is also a separate topic as well.

White Motor Co. v. United States, 372 U.S. 253,
83 S. Ct. 696 (1963);

Klor's v. Broadway-Hale Stores, 359 U.S. 207,
79 S. Ct. 705 (1959);

Jerrold Electronics Corp. v. Wescoast Broadcasting
Co., Inc., 341 F.2d 653 (9th Cir. 1965).

8. There is a Genuine Issue of Fact as to Whether GF Has an Exclusive Dealing Arrangement With CBS Relative to Sponsorship of Television Shows and Series Exhibited During Prime Time on Network Television.

Appellant in his verified complaint alleges that appellee GF has an exclusive agreement with CBS whereby GF will sponsor television series during prime time only with the CBS network. Appellee in his motion for summary judgment and the affidavits attached denies this allegation and lists the amount of time they purchase on the other two networks. But this is no answer in that buying spot time is quite different from being the sponsor of record of a series during prime time. Appellant in his answering affidavit in opposition to summary judgment said:

> "31. Sponsorship of television series means that the sponsor (advertiser) agrees to pay for 'time and talent' for the show for a set number of shows (usually 26). The sponsor also pays the advertising agency 15% of the time charges. The average cost for a one half hour television show are: $70,000.00 for talent, $80,000.00 for time, for a total of $150,000.00. This means $3.9 million for 26 weeks.
>
> "32. There are distinct advantages to being a sponsor of a television series as distinguished from 'spot sales.' To name a few: (a) a sponsor identification with the show, e.g. Bob Hope -Chrysler Theatre;

(b) some control over the content of the show, e.g. guest approval, script approval; (c) control of the license to the show; (d) financial control of the show, particularly in succeeding years; and (e) involvement in 'show business.'

"35. I have studied the ratings which reveal who is sponsoring what television series on what network during prime time, and they show that General Foods is a sponsor of record of television series during prime time only on the CBS television network." [CT 187-235].

Certainly from what has been explained above regarding the discounts given to large national television advertisers who buy many millions of dollars a year worth of television time is ample motivation for the existence of such exclusive dealing contracts between GF and CBS. The more television time GF buys on CBS the cheaper each minute is to GF.

See: FTC v. Proctor & Gamble, 386 U.S. 568 (1967).

9. There is a Genuine Issue of Fact as to Whether There is a Forbidden Tying Arrangement Between CBS and GF.

Appellant has alleged in substance in his verified complaint that there is an illegal tying arrangement between CBS and GF, and this issue of fact is also inherent in the two points raised immediately above. The tying arrangement is that CBS sells television air time,

and more narrowly CBS sells television air time during prime time. However, if a national advertiser is financially able and wishes to purchase prime time television time to sponsor a television series, said advertiser must sponsor a television series that is financially owned and controlled by CBS. Thus, the sale of television prime time is tied to sponsorship of a CBS owned and controlled television series.

There are a number of decisions which hold that tie-in agreements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market, for the tied product and a not insubstantial amount of interstate commerce is affected." Northern Pacific R. Co. v. United States, 356 U.S. 1, 6, 78 S. Ct. 514 (1958).

See also:

Times Picayune Publishing Co. v. United States,
345 U.S. 594, 73 S. Ct. 872 (1953);
Standard Oil Co. of Calif. and Standard Stations v. United States, 337 U.S. 293, 69 S. Ct. 1051 (1949);
United States v. Griffith, 334 U.S. 100,
68 S. Ct. 941 (1948);
United States v. Paramount Pictures, 334 U.S. 131,
68 S. Ct. 915 (1948);
International Salt Co. v. United States, 332 U.S. 392,
68 S. Ct. 12 (1947).

10. There is a Genuine Issue of Fact as to Whether GF Has Conspired, Combined and Agreed With CBS and Other Co-conspirators in Restraint of Trade.

Based on the foregoing points, there is little need to labor this point. Proof at trial that GF has agreed to boycott independently produced and financed television series from sponsorship and exhibition on television during prime time, and/or proof that GF has an exclusive dealing arrangement with CBS; and/or proof that GF and CBS have agreed to forbidden tying arrangements will prove this point also.

11. There is a Genuine Issue of Fact as to Whether GF Conspired With CBS and Other Co-conspirators to Monopolize or Attempt to Monopolize Television Shows and Series Exhibited During Prime Time Over the CBS Television Network.

Based on the foregoing background and the points discussed above, it seems apparent that this is a disputed issue of fact that can only be resolved by a trial on the merits. At this stage of this case, CBS' financial interest and control over virtually every television show and series that is exhibited over its network during prime time must be taken as a fact, and the remaining issue is whether or not GF and other co-conspirators agreed and conspired with CBS to bring about this state of affairs.

GF, to date in this case, seems to prefer to cast itself in

the role of a victim or one sinned against rather than a sinner; but this is not an adequate defense. George Stocking's paraphrase of Pope's poem appears accurate, appropriate and applicable:

> "Monopoly is a monster of such frightful men,
> "That to be hated needs but to be seen.
> "But seen too oft, familiar with her face,
> "We first endure, then pity, then embrace."

B. THE DISTRICT COURT ERRED IN QUASHING THE SUBPOENA ON MR. EBEL CALLING FOR HIS APPEARANCE AND TESTIMONY AT THE HEARING ON THE MOTION FOR SUMMARY JUDGMENT.

Edwin W. Ebel, Vice-President for Advertising Services for appellee GF, and named in the complaint as a co-conspirator, gave his affidavit in support of the motion for summary judgment. Mr. Ebel lives and works in the New York, New York area, but appellant was able to find him in Los Angeles, California, and subpoenaed him for the hearing on the motion for summary judgment. On appellee's motion, this subpoena was quashed. No discovery of any kind had been had as to appellee GF.

Rule 43(e) of the Federal Rules of Civil Procedure provides:

> "(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly

or partly on oral testimony or depositions."

Appellant at the hearing on the motion for summary judgment wanted to cross-examine affiant Ebel based upon his affidavit. There is no need for appellant to consume time and words extolling the value, significance and indispensability of the right of cross-examination. Listed below are just some of the questions appellant would have asked Mr. Ebel on cross-examination:

1. Since GF paid some $800,000 to have eight television pilot films made, and since it rated McGHEE as the best pilot, and since CBS said GF could exhibit McGHEE on its network (according to Mr. Ebel), why wasn't McGHEE put on the air?

2. When you said that you were "particularly interested" in the show COUNTRY COUSINS, what was it you were interested in, as there was no pilot and you had caused your company to spend $800,000 on pilots and then agreed to sponsor a series that had no pilot?

3. Did you know that CBS had a financial interest in and control over the two shows you agreed to sponsor on CBS as television series?

4. Why didn't you take the McGHEE pilot, or any of the other seven pilots you had paid for, to either ABC or NBC?

5. Although you purchase time on ABC and NBC, isn't it a fact that you are a sponsor of record of television series during prime time only on the CBS television network? Why?

6. Who has the syndication and distribution rights to the

television series GOMER PYLE and THE ANDY GRIFFITH SHOW?

There are also numerous factual conflicts between Mr. Ebel's affidavit, and the three affidavits appellant filed in opposition to the motion for summary judgment.

It was an abuse of discretion for the trial court to quash this subpoena on Mr. Ebel and then grant Mr. Ebel's employer summary judgment on the basis that there was no material fact issue in dispute.

C. THE DISTRICT COURT ERRED IN GRANTING APPELLEE'S MOTION THAT NO TESTIMONY BE TAKEN AT THE HEARING ON APPELLEE'S MOTION FOR SUMMARY JUDGMENT, AND BY SO DOING QUASHING THE SUBPOENA ON MR. LEE RICH.

Mr. Lee Rich was the Senior Vice-President in Charge of the Media, Radio and Television Departments of the Benton and Bowles Advertising Agency. His affidavit was filed in support of appelle's motion for summary judgment. Appellant subpoenaed him to attend and testify at the hearing on the motion for summary judgment. On appellee's motion, the District Court ordered that no testimony would be taken at the hearing. Mr. Rich did not move to quash the subpoena served upon him, but the court quashed it anyway.

What was said above as to Mr. Ebel's subpoena is applicable here, and no purpose would be served in repeating it.

D. FINDING OF FACT NO. 5 IS CLEARLY ERRONEOUS.

Finding of Fact No. 5 recited that:

> "5. On or about January 18 and 19, 1965, General Foods viewed the McGHEE pilot and the seven other pilot programs which had been produced for General Foods. None of these pilots was chosen for production as a series at that time because the officers of General Foods wanted to see what programs Defendant Columbia Broadcasting System, Inc. (hereinafter CBS) had to offer before reaching a final decision." [CT 236-240].

We keep in mind that the issue before the District Court was not what are the facts, but are there any disputed issues of fact.

In the affidavit of Mr. Sam Weisbord, Senior Vice-President of the William Morris Agency, Inc., filed by appellant in opposition to the motion for summary judgment, it is stated:

> "7. During January and February 1965, I received information from my associates in our New York office and from Mr. McGuire who had been in daily contact with Mr. Lee Rich, that the McGHEE pilot film was their No. 1 candidate to go on the air for General Foods in the fall as a new television series.
>
> "8. General Foods had an option to buy said television series. This option was extended to February

> 1, 1966 [sic] by which date General Foods could elect to sponsor a television series based on McGHEE pilot film, subject to General Foods obtaining a network time period acceptable to them. On the evening of February 1st, I received a call from Mr. Sol Leon of our New York office, in which Mr. Leon stated that in a phone conversation he had with Lee Rich, Mr. Rich had told Mr. Leon that Benton and Bowles was exercising its option on McGHEE subject to network acceptance of the series in a time spot acceptable to General Foods." [CT 187-235].

In the affidavit of appellant, Don McGuire, filed in opposition to the motion for summary judgment, it is stated:

> "19. While in New York in January of 1965, Lee Rich advised me that: defendant General Foods had looked at all 8 of their pilot films and then at a meeting in a club in New York City they voted and ranked in order of their preference the 8 pilot films; at this meeting, the following people were present, Messrs. Ebel, Pratt, Barry, Bunker, Seigelstine, Craig and Rich; McGHEE was voted as their number one choice to become a television series under General Foods sponsorship.
>
> "20. That same evening, I telephoned Ed Ebel at his home in New York and thanked him relative to the selection of McGHEE as their first choice; he advised me that it was his pleasure because McGHEE was far away the best show that they had and it would be on CBS

that year for General Foods.

"21. Within a day or so, Lee Rich telephoned me while I was still in New York and advised me that the pilots had been exhibited to the heads of the various divisions of defendant General Foods (Post Cereals, Maxwell House Coffee, Jello, etc.) at the General Foods offices in White Plains, New York, and all had agreed that McGHEE was far and away the best; he advised me that McGHEE would have to be shown to CBS on 'policy and taste' but there was no question as to the network's acceptance of McGHEE." [CT 187-235].

E. FINDING OF FACT NO. 7 IS CLEARLY ERRONEOUS.

Finding of Fact No. 7 recites that:

"7. From on or about January 25, 1965, to January 30, 1965, General Foods' officers discussed possible television program arrangements with CBS. During this period, General Foods viewed a CBS pilot called HOGAN'S HEROES. General Foods was also offered sponsorship of a proposed series entitled COUNTRY COUSINS (ultimately retitled GREEN ACRES). The officers of General Foods preferred both HOGAN'S HEROES and GREEN ACRES to any of the eight pilot programs which had been produced for General Foods." [CT 236-240].

This finding of act inspires incredulity and is clearly erroneous in that the officers of GF could not have preferred COUNTRY COUSINS (GREEN ACRES) "to any of the eight pilot programs which had been produced for General Foods" because COUNTRY COUSINS was not even a pilot. CBS in its answer to the complaint admitted that COUNTRY COUSINS was not a pilot. CBS in it answer to appellant's Interrogatory No. 34 swears that: there was no pilot for COUNTRY COUSINS, there was no script, but there was a two page series presentation and a 22 page script outline; no cast had been selected; no director had been selected; there were no contracts between the producer and the production company or between the production company and CBS; no music had been selected; and no budget had been reduced to final form.

Appellant's Interrogatory No. 32 reads in part: "State whether or not defendant CBS ever requested defendant GF to sponsor a television series on CBS television network called COUNTRY COUSINS;" and CBS' answer to this interrogatory reads: "No. A representative of CBS stated to General Foods that a series entitled COUNTRY COUSINS (now GREEN ACRES) might be available for the broadcast of commercial announcements relating to General Foods products."

Also, according to appellant's affidavit:

> "30. In the last week of January, 1965, in Los Angeles, California, I exhibited the PRESENTING MONA McCLUSKEY pilot film starring Juliet Prowse, to Mr. Ebel. At the time of the running, Mr. Ebel advised me

that he liked it very much. I asked him if his interest in the McCLUSKEY pilot film in any way lessens his interest in McGHEE and he replied, 'No, McGHEE has always been our number one choice.' Other people were present at the time Mr. Ebel made this statement. Within the next week or so, I was advised by Lee Rich that a big meeting was held at General Foods' offices in White Plains, New York, relative to the relationship between General Foods and CBS." [CT 187-235].

F. FINDING OF FACT NO. 9 IS CLEARLY ERRONEOUS.

Finding of fact No. 9 recites that:

"9. CBS did not refuse to exhibit McGHEE on its television network, but merely declined to schedule it at a certain time. Had General Foods wished to do so, it could have sponsored McGHEE on the CBS television network by scheduling it on Monday at 9:30 PM." [CT 236-240].

Appellant's affidavit in opposition to the motion for summary judgment states:

"26. Around February 1, 1965, Lee Rich advised me that Tom Dawson of CBS had advised him that James Aubrey of CBS did not like McGHEE and would not accept it for CBS; according to Mr. Rich, Mr. Dawson said to

Mr. Rich that Aubrey's only reason was that he, Aubrey, did not like the show.

"27. Lee Rich shortly thereafter advised me that he had contacted Tom Dawson again, regarding McGHEE, and that Tom Dawson had told Rich that Aubrey was adamant and refused to air McGHEE; Rich asked for a meeting between the General Foods people and James Aubrey and Mr. Dawson called Mr. Rich back and advised that Mr. Aubrey would meet with the General Foods people the following morning in Los Angeles.

"28. Abe Lastfogel, the President of the William Morris Agency, Inc., met with Messrs. Ebel, Rich, Pratt and Barry in Los Angeles prior to their meeting with Mr. Aubrey; and Mr. Lastfogel told them that because General Foods was exclusive to CBS in the sponsorship of television series during prime time and thus could not take their shows elsewhere, that James Aubrey was determined to force General Foods to buy CBS shows only; Mr. Lastfogel urged that General Foods insist on their right to select their own programming.

"29. Messrs. Ebel, Barry, Rich and Pratt, according to Lee Rich, met with James Aubrey in Los Angeles to urge Aubrey and CBS to accept McGHEE but Aubrey refused." [CT 187-235].

Abe Lastfogel, in his affidavit filed in opposition to the motion for summary judgment, swears:

"8. General Foods had an option to buy said McGHEE TV series. I was told by my associate, Mr. Weisbord, that he was told in a phone conversation with other associates in our New York office that General Foods was picking up the series, subject to obtaining acceptable Network time.

"9. Very shortly thereafter, I received a phone call from Mr. Rich, who asked me to be present at a meeting at the Bel-Aire Hotel which was attended by Messrs. Rich, Ebel, Pratt and Barry. They advised me that Tom Dawson of CBS had phoned Mr. Barry and Mr. Rich the night before and advised them that CBS would not schedule the McGHEE series on CBS. The four representatives wanted to explore what should be done by General Foods about trying to get CBS to change its position. The sum and substance of my conversation with them was that if General Foods, with all of its tremendous buying power at CBS, would not get CBS to reconsider and change its position, that there was no way I could be effective with CBS. I suggested that with such buying power General Foods ought to try to place the series on another Network." [CT 187-235].

G. FINDING OF FACT NO. 11 IS CLEARLY ERRONEOUS.

Finding of Fact No. 11 recites that:

> "11. General Foods has not agreed to boycott television programs and series in which CBS does not have a financial interest, nor has General Foods agreed or conspired with CBS to the effect, as alleged in the Complaint part V, par. 3, p. 8, 'that no television show or television series will be exhibited on the Defendant CBS television network during prime time unless Defendant CBS has a financial interest in and control of the television show or television series.' General Foods has in the past sponsored and still does sponsor for presentation on the CBS television network programs and series in which CBS has no financial interest." [CT 236-240].

The record in this case does not support this finding. When GF agreed to sponsor two CBS owned and controlled television series, and basically scrap the eight television pilots it had made for some $800,000, didn't it agree to boycott television series in which CBS did not have a financial interest? This question should only be answered when the history and development of CBS' control and financial interests in television series, and GF's participation in this history and development is fully understood.

This record at this time certainly does not support a finding that GF did not agree or conspire with CBS to the effect that no television series will be shown on prime time on the CBS television network unless CBS has an interest in and control over the series. The findings of the various governmental agencies and committees who have investigated network broadcasting are in accord that by

1964 the networks had a financial interest in over 93% of the shows and series exhibited on network television during prime time. GF has sponsored television series only on the CBS network, and this relationship has continued for a number of years. GF, because of the huge volume of television advertising it does on CBS, realizes substantial discounts, and if GF wished to continue obtaining its discounts and advertising its products by sponsoring television series on the CBS network, then it must have agreed and conspired with CBS as alleged in the complaint.

H. FINDING OF FACT NO. 12 IS CLEARLY ERRONEOUS.

Finding of Fact No. 12 recites:

> "12. General Foods has not agreed to deal exclusively with the CBS television network for its television advertising requirements, nor has General Foods agreed to purchase television time and talent exclusively from CBS." [CT 236-240].

This finding of fact is highly misleading. The sponsorship of television series exhibited during prime time on national television is the issue that is involved in the allegations of exclusive dealings between GF and CBS. Buying "spot time" on another network or daytime television are both vastly different from sponsorship of series during prime time. If the last clause of this finding, relating to time and talent, actually means sponsorship of a television series during prime time, then this is clearly erroneous in

that nowhere in the record is there any evidence that GF sponsors television series during prime time on any network but CBS' television network.

I. CONCLUSION OF LAW NO. 1 IS CLEARLY ERRONEOUS.

Conclusion of Law No. 1 recites:

> "1. The acquiescence by General Foods, at any time, in CBS' refusal to show a particular program does not constitute a conspiracy in restraint of trade or an unlawful agreement under the Sherman Act."
>
> [CT 236-240].

It is not clear to appellant as to just what is meant by the word "acquiescence" in this conclusion. It is also worth noting that in Finding of Fact No. 9, it specifically states that CBS did not refuse to exhibit McGHEE, and in this Conclusion, we have GF acquiescing in "CBS' refusal to show a particular program".

Appellee would have us believe that it contemplated buying some 15 minutes of time on the CBS television network, and even if GF wanted McGHEE but CBS refused McGHEE, and GF acquiesced in this refusal, it is not a conspiracy in restraint of trade. A closer examination of the facts indicates that GF was contemplating buying 15 minutes of time on the CBS television network; that is 15 commercial minutes per week during prime time for a minimum of 26 weeks. Or to say it another way, that is full sponsorship of five television shows of one-half hour length per week during prime

time, which is nearly one-tenth of a full week's prime time. The estimated cost of time and talent for a one-half hour television show is $150,000. Thus appellee was contemplating spending some $150,000 per show for five shows per week, for 26 weeks, which totals $19,500,000. And, in contemplating how to best spend this sum of money, GF spent some $800,000 for 8 television pilots. Of the 8 television pilots it wished to sponsor appellant's McGHEE as a series on CBS, but CBS refused, and GF acquiesced in this refusal. Then GF agreed to sponsor two CBS owned and controlled shows as series on the CBS network.

J. CONCLUSIONS OF LAW NOS. 2, 3 and 4 ARE CLEARLY ERRONEOUS.

Conclusion of Law No. 2 recites:

> "2. General Foods has not contracted or conspired with CBS to restrain interstate trade or commerce in television programs and series in violation of Section 1 of the Sherman Act."

Conclusion of Law No. 3 recites:

> "3. General Foods has not conspired with CBS to monopolize interstate trade or commerce in television programs and series in violation of Section 2 of the Sherman Act."

Conclusion of Law No. 4 recites:

> "4. General Foods has not entered into exclusive dealing agreements with CBS the effect of which have been

to lessen competition or tend to create a monopoly in the interstate commerce of television programs and series in violation of Section 3 of the Clayton Act." [CT 236-240].

In view of what appellant has set forth above, it seems apparent that these Conclusions are not supported by the facts or records in this case.

K. CONCLUSION OF LAW NO. 5 IS CLEARLY ERRONEOUS.

Conclusion of Law No. 5 recites:

> "5. Since there is no genuine issue as to the material facts necessary to support any of plaintiff's allegations of antitrust violations on the part of Defendant General Foods, said Defendant is entitled to summary judgment as a matter of law." [CT 236-240].

Appellant has amply demonstrated in both the trial court and in this brief that there are numerous genuine issues as to material facts, and GF is not entitled to summary judgment as a matter of law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's grant of summary judgment, and its orders quashing the subpoenas on Mr. Ebel and Mr. Rich be reversed.

Respectfully submitted,
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas R. Sheridan
THOMAS R. SHERIDAN

ANALYSIS OF COMPLAINT AND ANSWERS

THE COMPLAINT	ANSWER OF GENERAL FOODS	ANSWER OF CBS AND CBS FILMS
I	I	I
Jurisdiction and Venue		
1. The complaint is filed pursuant to 15 U. S. C. §1-7; 15 U. S. C. §12 et seq.	1. Admits.	1. Admits.
2. The defendants and each of them maintains offices and does business in Southern District of California.	2. Admits.	2. Admits.
II	II	II
Description of Parties		
1. a. McGuire a citizen of California; is a writer, director and producer.	1. a. Denies - doesn't know.	1. a. Denies - doesn't know
b. McGuire wrote, directed and produced McGHEE.	b. Admits McGuire connected with the pilot.	b. Denies - doesn't know
c. McGuire wrote, directed and produced MULLIGAN.	c. Admits McGuire connected with the pilot.	c. Denies - doesn't know
d. McGuire wrote, directed and produced McCLUSKEY.	d. Denies - doesn't know.	d. Denies - doesn't know

e. McGuire is an independent producer of TV and has been on network TV for years.	e. Denies - doesn't know.	e. Denies - doesn't know.
2. a. Def. CBS is a New York corporation, principal place of business in New York.	2. a. Denies - doesn't know.	2. a. Admits.
b. CBS does business in Southern District of California.	b. Denies - doesn't know.	b. Admits.
c. CBS operates CBS television network consisting of:	c. Denies - doesn't know.	c. Admits.
1. Five TV stations it owns: New York, Los Angeles, Chicago, Philadelphia, St. Louis.	1. Denies - doesn't know.	1. Admits.
2. 200 affiliated stations in U. S. and otherwise - Canada too.	2. Denies - doesn't know.	2. Admits.
d. CBS syndicates, operates foreign merchandising and distribution of TV shows.	d. Denies - doesn't know.	d. Admits.
e. CBS has subsidiaries throughout the world.	e. Denies - doesn't know.	e. Admits.
f. CBS owns CBS Films who produces TV shows - competes with pltf.	f. Denies - doesn't know.	f. Admits. But claims CBS Films syndicates, not produces.
g. CBS owns, has profit participation and investments in TV shows - competes with pltf.	g. Denies - doesn't know.	g. Admits.
3. a. CBS Films a California corporation, principal place of business	3. a. Denies - doesn't know.	3. a. Admits.

b. CBS **F**ilms produces TV shows, competes with pltf.	b. Denies - doesn't know.	b. Denies.
4. a. **GF** is a Delaware corporation - principal place of business in New York.	4. a. Admits.	4. a. Denies - doesn't know.
b. **GF** does business in Southern District of California.	b. Admits.	b. Denies - doesn't know.
c. **GF** markets packaged foods and grocery products - brands.	c. Admits.	c. Denies - doesn't know.
d. **GF** is a national TV advertiser, spends millions a year in prime time.	d. Admits.	d. Admits.
e. **GF** sponsors TV series on CBS and pays CBS for time and talent.	e. Admits.	e. Admits.
III	III	III
<u>Description of Co-Conspirators</u>		
1. a. (Affiliates) CBS owns five TV stations.	1. a. Denies - doesn't know.	1. a. Admits.
b. CBS has some 200 affiliated TV stations under contract.	b. Denies - doesn't know.	b. Admits.
c. CBS' affiliates are co-conspirators.	c. Denies - doesn't know.	c. Denies.
d. Any TV station who was an affiliate of CBS since 1960 is co-conspirator.	d. Denies - doesn't know.	d. Denies.

2. a. (Advertisers) CBS has contracts with national TV advertisers.	2. a. Denies.	2. a. Admits.
b. CBS has a contract with GF.	b. Admits.	b. Admits.
c. CBS' national advertisers during prime time are co-conspirators.	c. Denies.	c. Denies.
d. Any national TV advertiser with CBS during prime time since 1960 is a co-conspirator.	d. Denies.	d. Denies.
3. a. (Ad. Agencies) National advertisers use agencies in dealing with CBS.	3. a. Denies.	3. a. Admits.
b. GF uses ad agencies in dealing with CBS.	b. Admits.	b. Admits.
c. Ad agencies representing national advertisers with CBS since 1960 are co-conspirators.	c. Denies.	c. Denies.
d. Ad agencies of GF since 1960 are co-conspirators.	d. Denies.	d. Denies.
4. a. (CBS key executives) Frank Stanton.	4. a. Denies.	4. a. Denies.
b. William Paley	b. Denies.	b. Denies.
c. James Aubrey	c. Denies.	c. Denies.
d. John Schneider	d. Denies.	d. Denies.

f. Michael Dann	f. Denies	f. Denies.
g. Hunt Stromberg	g. Denies	g. Denies.
5. a. (GF key executives) C. W. Cook	5. a. Denies.	5. a. Denies.
b. Charles G. Mortimer, Sr.	b. Denies.	b. Denies.
c. A. E. Larkin, Jr.	c. Denies.	c. Denies.
d. James North	d. Denies.	d. Denies.
e. Edward Ebel	e. Denies.	e. Denies.
f. Charles Pratt	f. Denies.	f. Denies.
IV	IV	IV
Nature of Trade and Commerce		
1. a. TV shows on CBS during prime time are in interstate and foreign commerce.	1. a. Denies.	1. a. Admits.
b. Prime time is 3-1/2 hours, 7:30 to 11:00 P. M., 7 days a week except summers.	b. Denies.	b. Denies.
c. CBS network prime time are mostly films, made in Southern District of California and sent in interstate commerce to 200 cities in U. S. and elsewhere.	c. Denies.	c. Admits.
d. Network TV by definition is interstate and foreign commerce.	d. Denies.	d. Denies.

2. a. After TV series is on CBS network, it is frequently syndicated worldwide.	2. a. Denies - doesn't know.	2. a. Admits.
b. CBS engages in business of worldwide syndication and distribution of TV.	b. Denies - doesn't know.	b. Admits.
3. a. GF advertises its products on CBS during prime time.	3. a. Admits.	3. a. Admits.
b. GF commercials are films made in New York or California and sent in interstate and foreign commerce.	b. Denies.	b. Denies - doesn't know.
V	V	V
Offenses Charged		
1. a. Beginning in 1960 CBS started policy of not showing TV show or series on its network unless it had a financial interest therein.	1. a. Denies.	1. a. Denies.
b. Each year for past five years CBS increased its financial interest in percentage of shows during prime time.	b. Denies.	b. Denies.
c. For 1965-66 TV season CBS has financial interest in virtually every TV show on its network during prime time.	c. Denies.	c. Denies.
d. In achieving this, CBS and co-	d. Denies.	d. Denies.

2.	Defendants and co-conspirators have conspired to restrain trade of TV shows and series for exhibition on CBS network during prime time.	2.	Denies.	2.	Denies.
3. a.	Object of conspiracy: no show on CBS unless CBS had a financial interest in and control of the show.	3. a.	Denies.	3. a.	Denies.
b.	Part of conspiracy to boycott independently produced shows.	b.	Denies.	b.	Denies.
c.	GF agreed to boycott independently produced shows.	c.	Denies.	c.	Denies.
4. a.	Part of said conspiracy to have advertisers sponsor shows on CBS during prime time that were produced by CBS Films or produced in conjunction with CBS.	4. a.	Denies.	4. a.	Denies.
b.	CBS not allow advertisers to sponsor shows during prime time that were independently produced by competitors.	b.	Denies.	b.	Denies.
5.	Part of conspiracy that CBS would get exclusive contracts from advertisers so advertiser would not sponsor shows during prime time on other networks.	5.	Denies.	5.	Denies.
6.	In 1964 CBS and GF had exclusive contract whereby GF not to sponsor shows during prime time on other networks: effect lessen competition	6.	Denies.	6.	Denies.

7.	Beginning in 1960 CBS monopolize and conspired with debts. and co-conspirators to monopolize commerce of TV shows to be exhibited during prime time on CBS network.	7.	Denies.	7.	Denies.
8. a.	The monopoly consists of CBS' demand to have a financial interest in and control of every show exhibited during prime time on CBS network.	8. a.	Denies.	8. a.	Denies.
b.	Affiliates have no control over what will become a series and under their contracts with CBS they must take CBS shows even though CBS has a financial interest in the show.	b.	Denies.	b.	Denies.
9.	All of this activity is in violation of antitrust laws and will continue unless the relief prayed for is granted.	9.	Denies.	9.	Denies.
	VI		VI		VI

Details of the Offenses Charged

A. Regarding McGHEE and MULLIGAN.

A.		A.	A.
1.	In summer of 1964 GF committed itself to finance 8 TV pilots for the 1965-66 season at a cost of $816,000.	1. Admits it commissioned the production of 8 TV pilots in 1964. Denies the amount.	1. Denies - doesn't know.

2.	Benton & Bowles for GF requested in Los Angeles in 1964 that pltf. write, direct and produce 2 of the 8 pilots: McGHEE and MULLIGAN.	2.	Admits B & B on its behalf arranged for the participation of pltf. in the pilots McGHEE and THE JANET LEIGH SHOW.	2.	Doesn't know.
3.	Pltf. wrote McGHEE in Los Angeles in 1964.	3.	Denies - doesn't know.	3.	Doesn't know.
4.	Pltf. directed McGHEE in Los Angeles in 1964.	4.	Denies - doesn't know.	4.	Doesn't know.
5.	Pltf. produced McGHEE in Los Angeles in 1964.	5.	Denies - doesn't know.	5.	Doesn't know.
6.	Pltf. wrote MULLIGAN in Los Angeles in 1964.	6.	Denies - doesn't know.	6.	Doesn't know.
7.	Pltf. directed MULLIGAN in Los Angeles in 1964.	7.	Denies - doesn't know.	7.	Doesn't know.
8.	Pltf. produced MULLIGAN in Los Angeles in 1964.	8.	Denies - doesn't know.	8.	Doesn't know.
9.	CBS and CBS Films had no financial interest in or control over either McGHEE or MULLIGAN.	9.	Denies - doesn't know.	9.	Admits.
10.	Pltf. delivered finished prints of McGHEE and MULLIGAN to def. GF in January, 1965.	10.	Admits prints made available for viewing in January, 1965.	10.	Doesn't know.
11. a.	Def. GF viewed the 8 pilots it had financed.	11. a.	Admits.	11. a.	Doesn't know.

b.	Def. **GF** notified pltf. and William Morris Agency that McGHEE was best and **GF** would sponsor it as a series on CBS in 1965-66.	b.	Denies.	b.	Doesn't know.
12.	**GF** requested pltf. to exhibit McGHEE and MULLIGAN for CBS in Los Angeles.	12.	Admits they arranged for CBS to see them and others in Los Angeles.	12.	Doesn't know.
13.	Pltf. exhibited McGHEE and MULLIGAN FOR CBS in Los Angeles.	13.	Denies.	13.	Denies, but admits they saw McGHEE in Los Angeles.
14.	Pltf. told CBS that **GF** had selected McGHEE to sponsor on CBS in 1965-66.	14.	Denies.	14.	Denies, but admits they saw McGHEE in Los Angeles.
15. a.	CBS told **GF** that CBS would not exhibit McGHEE.	15. a.	Denies.	15. a.	Denies, but admits they saw McGHEE in Los Angeles.
b.	CBS told **GF** that **GF** should sponsor COUNTRY COUSINS and HOGAN'S HEROES.	b.	Denies.	b.	Denies, but admits they saw McGHEE in Los Angeles.
16. a.	COUNTRY COUSINS (GREEN ACRES) in Feb. 1965 not a pilot, just a title.	16. a.	Denies.	16. a.	Denies, but admits it was not a pilot.
b.	HOGAN'S HEROES in Feb. 1965 was a pilot.	b.	Denies.	b.	Denies, but admits it was a pilot.
17. a.	CBS had a financial interest in and control of COUNTRY COUSINS.	17. a.	Denies - doesn't know.	17. a.	Denies, admits it had certain rights in it.

b. CBS had a financial interest in and control of HOGAN'S HEROES.	b. Denies - doesn't know.	b. Denies, admits it had certain rights in it.
18. a. GF with Benton & Bowles met CBS and asked for McGHEE as a TV series.	18. a. Denies.	18. a. Denies.
b. CBS refused and said sponsor	b. Denies.	Denies.
19. GF agreed with CBS to sponsor 1/2 of COUNTRY COUSINS and 1/2 of HOGAN'S HEROES.	19. Admits that it agreed with CBS to participate in their sponsorship	19. Admits GF agreed to broadcast commercials on these shows.
20. McGHEE viewed by many prospective sponsors.	20. Denies - doesn't know.	20. Doesn't know.
21. Proctor & Gamble and Philip Morris had first call on Monday 9:30 P. M. on CBS.	21. Denies - doesn't know.	21. Denies.
22. a. Proctor & Gamble and Philip Morris viewed McGHEE.	22. a. Denies - doesn't know.	22. a. Denies.
b. They notified CBS that they would sponsor McGHEE on Monday at 9:30 P. M.	Denies - doesn't know.	b. Denies.
23. CBS refused to exhibit McGHEE and told Proctor & Gamble and Philip Morris if they wanted Monday 9:30 P. M. they should sponsor SELENA.	23. Denies - doesn't know.	23. Denies.
24. SELENA was to star Polly Bergen and at the time was not a pilot.	24. Denies - doesn't know.	24. Denies, but admits that in Feb. 1965 it was not a pilot.

25.	CBS had and has a financial interest in and control of SELENA.	25.	Denies - doesn't know.	25.	Denies, but admits it had ''certain rights' in SELENA.
26.	Proctor & Gamble and Philip Morris refused to sponsor SELENA.	26.	Denies - doesn't know.	26.	Denies.
27.	CBS in Feb. 1965 had a change of top management.	27.	Denies - doesn't know.	27.	Denies but admits in Feb. 1965 changes in personnel of CBS TV.
28.	Proctor & Gamble and Philip Morris approached CBS new management and again requested McGHEE for Monday night on CBS.	28.	Denies - doesn't know.	28.	Denies.
29.	CBS again refused and told them to sponsor HAZEL.	29.	Denies - doesn't know.	29.	Denies.
30.	CBS had obtained the rights to HAZEL which had been on another network and thus had financial control of it.	30.	Denies - doesn't know.	30.	Denies but admits that it obtained certain rights to HAZEL which had been on another network for years.
31.	Proctor & Gamble and Philip Morris agreed with CBS to sponsor HAZEL on CBS on Monday at 9:30 P. M. in 1965-66 season.	31.	Denies - doesn't know.	31.	Denies but admits that they sponsor HAZEL on Monday at 9:30 P. M. during 1965-66.
B.	<u>Regarding McCLUSKEY</u>				
32.	Pltf. wrote McCLUSKEY TV pilot in Los Angeles in 1964.	32.	Denies - doesn't know.	32.	Denies - doesn't know.

34.	Pltf. produced McCLUSKEY TV pilot in Los Angeles in 1964.	34.	Denies - doesn't know.	34.	Denies - doesn't know.
35.	CBS and CBS Films had no financial interest in or control of McCLUSKEY.	35.	Denies - doesn't know.	35.	Admits.
36.	In Feb. 1965 Philip Morris viewed McCLUSKEY.	36.	Denies - doesn't know.	36.	Doesn't know.
37.	CBS has contractual relationship with Philip Morris requiring Philip Morris to sponsor TV shows during prime time exclusively on CBS.	37.	Denies - doesn't know.	37.	Denies.
38.	Philip Morris notified pltf., William Morris Agency and Benton & Bowles that they would sponsor McCLUSKEY on CBS during prime time in 1965-66.	38.	Denies - doesn't know.	38.	Doesn't know.
39.	CBS viewed McCLUSKEY.	39.	Denies - doesn't know.	39.	Admits.
40.	CBS told Philip Morris they would not exhibit McCLUSKEY on CBS.	40.	Denies - doesn't know.	40.	Denies.
41.	CBS told Philip Morris to sponsor one of 6 other shows in which CBS had financial interest and control if they wanted to be on CBS.	41.	Denies - doesn't know.	41.	Denies.
42.	Philip Morris withdrew its offer to sponsor McCLUSKEY	42.	Denies - doesn't know.	42.	Denies.

C. Regarding Control	C.	C.
43. CBS Films produces and controls a substantial percentage of shows exhibited on CBS during prime time.	43. Denies - doesn't know.	43. Denies.
44. Over past 5 years CBS acquired a financial interest in and control over an ever increasing percentage of shows on prime time until it now has it in virtually every show on 1965-66 season.	44. Denies.	44. Denies.
VII	VII	VII
Effects of the Monopoly, Attempt to Monopolize, Exclusive Dealings, and the Unlawful Combinations, Agreements and Conspiracies.		
1. The following effects have stemmed from the defts' actions:		
a. Competition among the 3 TV networks for national advertising sponsors has been eliminated.	a. Denies	a. Denies
b. National advertisers have been prevented from sponsoring TV shows during prime time on other networks.	b. Denies	b. Denies
c. Competition among the producers of TV shows for prime time has been eliminated	c. Denies	c. Denies

d. Competition among directors of TV shows for prime time has been eliminated.	d. Denies	d. Denies
e. Competition among the writers of TV shows for prime time has been eliminated.	e. Denies	e. Denies
f. Competition among the financial investors and owners in TV shows for prime time has been eliminated.	f. Denies	f. Denies
g. Competition among actors cameramen, musicians and production crews of TV shows for prime time has been eliminated.	g. Denies	g. Denies
h. Competition among distributors of TV shows for prime time has been eliminated.	h. Denies.	h. Denies.
i. Competition among syndicators of TV shows for prime time has been eliminated.	i. Denies.	i. Denies.
j. Competition among foreign syndicators of TV shows for prime time has been eliminated.	j. Denies.	j. Denies.

k. Competition among the studios where TV shows for prime time are made has been eliminated.	k. Denies.	k. Denies.
l. Independent production companies of TV shows for prime time have been prevented from selling their shows to national advertisers for airing on CBS.	l. Denies.	l. Denies.
m. Independent writers, directors, producers, actors, camermen, musicians and crews have been prevented from having their work product in TV shows for prime time being aired on CBS.	m. Denies.	m. Denies.
n. Independent distributors, syndicators and foreign syndicators of TV shows for prime time have been prevented from distributing and syndicating prime time TV shows.	n. Denies.	n. Denies.
o. Competition among the advertising agencies representing national advertisers has been eliminated.	o. Denies.	o. Denies.
p. Advertising agencies representing national advertisers have been prevented from dealing with independently produced or	p. Denies.	p. Denies.

q. Competition among CBS' affiliates for TV shows for prime time has been eliminated.	q. Denies.	q. Denies.
r. CBS affiliates have been prevented from deciding what will or will not become a TV series during prime time.	r. Denies.	r. Denies.
2. The pltf. has been damaged as a direct result of the above described activities of defts.	2. Denies.	2. Denies.
VIII	VIII	VIII
<u>Prayer for Relief.</u>		